No. 87-1061-CSX
Status: GRANTED

Title: National Collegiate Athletic Association, Petitioner
v.
Jerry Tarkanian

Docketed:
December 23, 1987

Court: Supreme Court of Nevada

Counsel for petitioner: Gangwere,George H., Lee,Rex E.

Counsel for respondent: Lionel,Samuel S.

Note: Time to file ext. by O'Connor, J., to & inc. 12/25/87 cited

Entry	Date	Note	Proceedings and Orders
1	Nov 18 1987		Application for extension of time to file petition and order granting same until December 25, 1987 (O'Connor, November 21, 1987).
2	Dec 23 1987	G	Petition for writ of certiorari filed.
3	Dec 23 1987		Appendix of petitioner Natl. Collegiate Athletic Association filed.
4	Jan 27 1988	X	Brief of respondent Jerry Tarkanian in opposition filed.
5	Jan 27 1988		DISTRIBUTED. February 19, 1988
6	Feb 22 1988		Petition GRANTED. limited to Question 1 presented by the petition.
			**********
8	Mar 29 1988		Order extending time to file brief of petitioner on the merits until April 30, 1988.
9	Apr 29 1988		Joint appendix filed.
10	Apr 29 1988		Brief of petitioner Natl. Collegiate Athletic Association filed.
11	May 13 1988		Record filed.
		*	Certified copy of original record received.
14	May 23 1988		Order extending time to file brief of respondent on the merits until June 16, 1988.
12	May 26 1988		Record filed.
		*	Certified copy of original record on appeal received.
15	Jun 14 1988		Brief of respondent Jerry Tarkanian filed.
16	Jun 23 1988		CIRCULATED.
17	Jul 1 1988		Record filed.
		*	Certified original district court record, vols. I thru XII and exhibits, 2 boxes, received.
18	Jul 13 1988	X	Reply brief of petitioner Natl. Collegiate Athletic Association filed.
19	Jul 15 1988		Set for argument. Wednesday, October 5, 1988. (1st case) (1 hr.)
20	Oct 5 1988		ARGUED.

87 - 1061

No. 87-

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In the Supreme Court of the United States

OCTOBER TERM, 1987

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Petitioner,

vs.

JERRY TARKANIAN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

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QUESTIONS PRESENTED

The Supreme Court of Nevada held in this case that the actions of the National Collegiate Athletic Association ("NCAA"), taken against the University of Nevada, Las Vegas ("UNLV") for violation by its head basketball coach, Jerry Tarkanian, of rules adopted by member universities, violated 42 U.S.C. §1983 and the due process clause of the Fourteenth Amendment to the Constitution of the United States of America. Because enforcement of NCAA rules and regulations applicable in all fifty states can be thwarted by idiosyncratic construction of the U.S. Constitution and statutes by a state court if there is no review by a federal court, this Court should consider the following questions:

1. Whether the action of the NCAA in directing one of its members, a state university, to show cause why it should not temporarily suspend an employee from his duties relating to intercollegiate athletics for violating the Association's rules, constitutes state action, where the member university, in compliance with NCAA rules, suspends the coach from coaching.

2. Whether the NCAA and UNLV provided Jerry Tarkanian the process due him by granting him the opportunity to hear the charges against him and to respond in a meaningful way during five separate hearings, where the hearings resulted in UNLV temporarily suspending his head basketball coaching duties for two years, even though the NCAA failed to present its evidence at the hearings by affidavits of witnesses.

3. Whether rights created by state law, or only rights created by the U.S. Constitution, are protected by substantive due process and, if the former, whether Nevada courts erred in finding that the decisions of the NCAA

committee on Infractions and Council were arbitrary and capricious where the Nevada courts did not examine the information relied on by the Committee and Council to determine whether the decisions were supported by evidence.

4. Whether U.S. District Courts should be permitted to inquire whether a defendant was joined, or an indispensable party was not joined, for the sole purpose of defeating removal of a federal question action from state courts to a U.S. District Court, notwithstanding that an originally-named defendant declined to timely remove the case.

5. Whether the federal question removal statute, 28 U.S.C. §1441(a), should be interpreted to authorize an indispensable party to remove an action to federal court within 30 days of joinder, despite the failure of an originally-named defendant to timely remove.

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No. 87-

In the Supreme Court of the United States

OCTOBER TERM, 1987

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Petitioner,

vs.

JERRY TARKANIAN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

OPINIONS BELOW

The 1979 Opinion of the Supreme Court of Nevada (App. E, *infra*) is reported at 95 Nev. 389, 594 P.2d 1159 (1979). The 1987 Opinion of the Supreme Court of Nevada (App. B, *infra*) is reported at 741 P.2d 1345 (Nev. 1987). The 1980 (App. H, *infra*) and 1984 (App. J, *infra*) orders for remand by the United States District Court for the District of Nevada are not reported. The orders of the United States Court of Appeals for the Ninth Circuit (App. M, N, *infra*) are not reported.

JURISDICTION

The judgment of the Supreme Court of Nevada (App. B, *infra*) was entered on August 27, 1987. This Court granted petitioner an extension of time to and including December 25, 1987 to file its petition for writ of certiorari. (App. A, *infra*.) The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS STATUTES INVOLVED

Amendment XIV to the United States Constitution states, in relevant part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law.

42 U.S.C. §1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

The National Collegiate Athletic Association ("NCAA") is a private, voluntary association consisting of nearly 1,000 public and private colleges and universities, athletic conferences and associations and other educational institutions. It was founded near the turn of the century in response to public outcry about the increasing violence, injury and professionalism in college football. It has since expanded to encompass literally dozens of college level sports, and thousands of participating coaches and student athletes.

In the early 1950s, a self-policing enforcement program was established by NCAA members to control perceived abuses in the professionalization of college athletes and to govern the recruitment, admissions, financial aid and eligibility of student athletes by member colleges and universities. Under the rules, coaches and their staffs are prohibited from offering recruits payment or other incentives to attend their colleges and universities, or to provide enrolled athletes extra benefits not made available to the student population in general.

The NCAA received information in 1972 that the University of Nevada - Las Vegas ("UNLV"), had violated the rules regarding recruiting and extra benefits. The NCAA Committee on Infractions authorized its enforcement staff to investigate these allegations. The President of UNLV was notified of the preliminary inquiry on November 28, 1972. NCAA investigators found substantial and reliable information that violations had occurred. The Committee on Infractions issued to UNLV an Official Inquiry on February 25, 1976. The official inquiry directed the University to investigate each of the 72 detailed allegations set out in the inquiry, a number of which regarded respondent, Jerry Tarkanian (hereafter "Tarkanian"), and to respond by June 1, 1976. A supplemental inquiry containing six additional items was later forwarded to UNLV.

After two extensions of time were granted, UNLV submitted to the Committee on Infractions an official response. The response denied each allegation regarding Jerry Tarkanian. In addition, the University also questioned the veracity and integrity of the investigators.

The Committee on Infractions considered the allegations in a hearing lasting three days over a one month period. Tarkanian was present for all three days of the hearings, two of them with his attorney present. He and his attorney were allowed to speak and to present oral

and written evidence to refute the testimony presented by the staff investigators. After deliberating, the Committee found the University in violation of NCAA rules regarding recruiting and extra benefits for student athletes, including ten rule violations by Tarkanian.[1] The Committee issued its findings in Confidential Report Number 123 (47), directed to the President of UNLV, which recommended sanctions against the University. Among the sanctions recommended was an Order to Show Cause why UNLV should not suspend Tarkanian from coaching for a period of two years.

The University appealed certain findings and penalties, including all involving Tarkanian, to the NCAA's governing body, the Council,[2] in May 1977. Following a lengthy hearing, at which Tarkanian appeared with counsel, the Council unanimously affirmed the findings and penalties of the Committee on Infractions. The University was again ordered to show cause why it should not suspend Tarkanian for two years.

On September 6, 1977, UNLV conducted a hearing to determine whether to follow the NCAA's directives. Reluctantly, UNLV adopted the findings and penalties of the NCAA, and suspended Tarkanian from his coaching duties for two years, effective September 8, 1977.

Tarkanian brought suit against UNLV on September 8, 1977, in the Eighth Judicial Circuit, Clark County, Nevada. The NCAA was not joined in that action and UNLV refused to remove the action to federal court.

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1. Among other infractions, it was found that Tarkanian had arranged a grade of "B" for a student athlete, illegally recruited at least two prospective athletes, provided free airline transportation for at least one student athlete, pressured one athlete and his family to not cooperate with the NCAA and falsely certified his program was in compliance with NCAA rules.

2. The NCAA Council was composed of sixteen faculty members from NCAA member schools.

Tarkanian sought injunctive relief from the sanctions imposed by the University the day before. The NCAA hearing, he contended, had violated his right to counsel, to confront witnesses, to an impartial fact finder and to other rights guaranteed by the Fourteenth Amendment. The University's reliance on the NCAA's findings, he argued, was therefore also constitutionally infirm. The Trial Court granted Tarkanian's injunctive relief, based upon the legal briefs and joint stipulations of fact of the parties. The Nevada Supreme Court reversed for failure to join an indispensable party, the NCAA.

Tarkanian commenced the second phase of this lawsuit in July 1979 against both UNLV and the NCAA. Within 30 days, the NCAA and UNLV filed a joint petition for removal to the United States District Court for the District of Nevada. The case was remanded on motion of Tarkanian, for failure of UNLV to timely remove, in that it had failed to remove within 30 days of receipt of service of process in 1977.

Following remand, the case proceeded to trial in State Court. After a two-week bench trial, the Judge agreed with Tarkanian on most issues. He issued an opinion on June 25, 1984 that the actions of the NCAA constituted state action and that Tarkanian had been deprived of liberty and property interests without procedural and substantive due process of law, all in violation of 42 U.S.C. §1983 and the Fourteenth Amendment to the Constitution. He permanently enjoined the University and the NCAA from suspending Tarkanian, and from taking any action to enforce its sanctions. He later awarded attorney's fees of nearly $200,000.00 to Tarkanian.

The NCAA filed a second petition for removal on July 17, 1984 for two reasons. First, it had become apparent at the second trial that the University had been

joined as the only original defendant for the purpose of thwarting removal by the NCAA, and that it should be realigned as a plaintiff. Second, Tarkanian's request for attorney's fees under 42 U.S.C. §1988 constituted a new and independent federal action for removal. The Federal District Court disagreed, and again remanded the case to State Court for failure of UNLV to timely petition for removal.

The Trial Court's judgment was appealed by the NCAA to the Nevada Supreme Court. The Supreme Court, in an opinion issued August 27, 1987, affirmed. (App. B, *infra.*) First, it found the NCAA to be a state actor despite the trend of this Court to limit or narrow the definition of state action. Second, it found NCAA procedures did not afford Tarkanian "due process of law" under "the circumstances of the case." It limited the injunction to those penalties imposed with respect to Tarkanian in Confidential Report Number 123(47) and UNLV's adoption of those penalties. It also remanded the issue of attorney's fees to the State Court for further determination.

REASONS FOR GRANTING THE PETITION

I. Is the NCAA a State Actor?

It is firmly embedded in our constitutional heritage that "the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States." *Shelley v. Kraemer,* 334 U.S. 1, 13 (1948). The Fourteenth Amendment erects no shield against merely private conduct, however discriminatory or wrongful. *Blum v. Yaretsky,* 457 U.S. 991, 1002 (1982). Critical to respondent's due process claims is the more fundamental issue of whether the NCAA's actions constitute state action. For if he cannot show this, his constitutional claims must fall.

Originally, this Court's test for state action was broad. Indirect involvement by state governments could make conduct normally considered to be private action into state action. Under this "entanglement" theory, a private actor became intertwined with government policies and regulations. This entanglement did not require exclusive or even direct government involvement. State action could be found even though the government's participation was peripheral or was only one of several cooperative forces leading to a constitutional violation. *United States v. Guest,* 383 U.S. 745, 755-56 (1966).

It was against this backdrop that early cases determined that the NCAA was a state actor. *Parish v. NCAA,* 506 F.2d 1028 (5th Cir. 1975); *Howard University v. NCAA,* 510 F.2d 213 (D.C. Cir. 1975); *Associated Students, Inc. v. NCAA,* 493 F.2d 1251 (9th Cir. 1974); *Regents of University of Minnesota v. NCAA,* 560 F.2d 352 (8th Cir. 1977), *cert. dismissed,* 434 U.S. 978 (1977). These cases were premised on the theory that one-half of the members of the NCAA were state-supported universities, providing the necessary government entanglement.

This Court changed the rules of the game in 1982. Now, in order to establish state action, a party must establish one of two things: (1) the private actor is serving a function which is traditionally and exclusively a state function; *Rendell-Baker v. Kohn,* 457 U.S. 830 (1982); *Blum v. Yaretsky,* 457 U.S. 991 (1982); or (2) the state exercised coercive power or provided such significant encouragement, either overt or covert, that the action must in law be deemed to be that of the state. *San Francisco Arts & Athletics, Inc. v. U. S. Olympic Committee,* 483 U.S. ..... (1987).

The courts have struggled with the determination of what actions are traditionally and exclusively state actions. The court below, for instance, held that respondent's temporary suspension from coaching basketball is such a traditionally and exclusively state function. It termed the NCAA's action a "personnel decision."[3]

The propriety of the decision of the court below is questionable. Cases decided since *Rendell-Baker* and *Blum* have routinely held that the NCAA's regulation of intercollegiate athletics is *not* a traditionally and exclusively state function. *See, Arlosoroff v. NCAA*, 746 F.2d 1019 (4th Cir. 1984); *Graham v. NCAA*, 804 F.2d 953 (6th Cir. 1986); *Karmanos v. Baker*, 816 F.2d 258 (6th Cir. 1987); *McHale v. Cornell University*, 620 F.Supp. 67 (N.D. N.Y. 1985); *Kneeland v. NCAA*, 650 F.Supp. 1047 (W.D. Tex. 1986); *Vanelli v. NCAA*, No. 3-84-1680 slip op. (D. Minn. Sept. 25, 1985); *Hawkins v. NCAA*, 652 F.Supp. 602 (C.D. Ill. 1987); *Barbay v. NCAA*, No. 86-5697 (E.D. La. Jan. 20, 1987). This should be sufficient to preclude application of state action to the NCAA.

Even more persuasive is this Court's recent decision in *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, supra.* In that case, the SFAA decided to produce and sponsor the "Gay Olympic Games." Congress gave exclusive control over the word "Olympics" to the United States Olympic Committee ("USOC") in

3. This myopic view of the NCAA's function in regulating intercollegiate athletics points up the way in which a court can manipulate the test to reach the desired result. The NCAA membership rules merely establish minimum guidelines which institutions and their employees, including coaches, agree to follow. If the institution chooses not to follow the rules, it is subject to sanctions, to which it has also previously agreed. The situation is no different from the regulation and administration of the LSAT test by a private company, on which virtually every law school, public or private, relies for admission, which function has been held not to be state action. *Johnson v. Educational Testing Service*, 754 F.2d 20 (1st Cir. 1985), *cert. denied*, 472 U.S. 1029 (1985).

1976. When the USOC prohibited the California group's use of the word, the SFAA filed suit. The USOC's prohibition, it contended, was discriminatory in violation of the Fifth Amendment. The USOC countered that it was not a governmental actor. This Court ruled that the USOC was not a governmental actor, despite being federally chartered, federally subsidized and federally monitored.

Further, this Court held that "neither the conduct nor the coordination of amateur sports has been a traditional governmental function." *Id.* We submit that the function and purpose of the United States Olympic Committee is analogous to that of the NCAA, while the "entanglements" are far less. Both are private organizations. Both regulate amateur athletics. Neither are state actors. Regrettably, *San Francisco Arts* did not offer this Court an opportunity to further define what actions are traditionally and exclusively state functions. The instant case offers this Court a unique opportunity to further clarify this important area of law.

The Court below also misapplied the second test of state action. Justice White, in *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922 (1982), noted that this Court has articulated a number of different factors or tests of state action in different contexts.[4] The Nevada Supreme Court applied a totally inappropriate state action test taken from *Lugar*. *Lugar* involved a challenge under 42 U.S.C. §1983 to prejudgment attachment under Virginia law. The attachment there was issued by a court clerk, acting on an *ex parte* petition. Thirty-four days later, the trial judge dismissed the attachment for failure of defendant to establish the statutory requisites. This Court found state action by the party seeking the attachment in that it had

4. Justice White noted the "public function" test, the "state compulsion" test, the "nexus" test and, in the case of prejudgment attachments, the "joint action" test. *Lugar, supra*, at 939.

jointly participated with state officials *under Virginia state law* to deprive petitioner of his rights. This Court expressly noted that its holding was "limited to the particular context of prejudgment attachment." *Id.* at 940, n.21.

The Court below tortured the facts before it in an attempt to bring this case under the *Lugar* test. The NCAA, it held, acted under state law in that UNLV impliedly authorized the sanctions against Tarkanian. (App. B, *infra.*) In addition, it ruled that the NCAA could be fairly said to be a state actor because UNLV delegated personnel decisions to it. (App. B, *infra.*) It then stretched the *Lugar* test to cover these facts.

San Francisco Arts made it clear that the state must have a direct impact on the private actor in order for the private conduct to constitute state action. Simple acquiescence in or approval of the private action is not sufficient. Neither respondent nor the Nevada Supreme Court seriously suggest that UNLV or any other state agency coerced or even encouraged the action taken by the NCAA. In fact, UNLV fought the NCAA long and hard.

Nor did the action taken against Tarkanian result from any state law or regulation. The NCAA is not an agency which is established by or subject to any state government. It is a voluntary association governed by its own conventions and elected committees, which diminishes the extent to which any one school can dominate. This does not suggest that, through membership, public universities have no involvement in NCAA decisions. Of course, they do. However, such input does not rise to the level of coercive power such that the decision made against respondent must be deemed to be that of the state itself.

Although the Nevada Supreme Court is out of step with the times, its error is perhaps attributable in part

to the need for a clear test of state action. Articulation of a clear test is important to all private organizations that deal with the government, yet want to maintain their private status. For this reason, certiorari is warranted in this case.

The governance of intercollegiate athletics to insure minimum standards for scholarship, sportsmanship and amateurism is a national concern. No statute or governmental rule-making agency provides these standards. For years the majority of the nation's colleges and universities, as members of the NCAA, have voluntarily adopted rules governing recruiting, admission, eligibility and financial aid of student-athletes. This court in *NCAA v. Board of Regents of University of Oklahoma,* 468 U.S. 85 (1984) recognized the public interest served by the NCAA. The interstate nature of the association requires, however, that its rules be subject to uniform application and construction of applicable laws by the courts. Its members are located in all fifty of the United States. Since the association is unincorporated and private, it is subject to suit in every state. It cannot claim diversity jurisdiction and is thwarted often in removing a federal question from state to federal court jurisdiction. It is generally accepted that the NCAA performs a laudable purpose in governing intercollegiate athletics and that its governance is not state action absent a showing a state "directed" or "coerced" certain NCAA conduct.

Even so, certain state courts, and some U.S. District Courts (perhaps because of parochial interests in protecting the local team, coach, athlete, or alumnus) do, consciously or unconsciously, provide a home court advantage. This situation requires that this Court announce clearly to lower courts that the NCAA's governance of amateur sports is not a function traditionally reserved to the various states and that the imposition of sanctions

upon a member institution, even though it affects a coach's duties or the eligibility or financial aid of a student-athlete, does not constitute a symbiotic relationship with a public college or university.

The Fourth Circuit in *Arlosoroff*, the Sixth Circuit in both *Graham* and *Karmanos*, and various U.S. District Courts in reported opinions have clearly applied this Court's holdings in *Blum* and *Rendell-Baker* to the NCAA's governance of intercollegiate athletics. Still, the Nevada Supreme Court ignored these decisions and tortured the language of *Lugar* in order to arrive at the decision that it was state action for the NCAA to direct UNLV to show cause why it should not temporarily suspend its basketball coach from his head coaching duties.

The Nevada Supreme Court held that the NCAA failed both prongs of the *Lugar* test. It said that "UNLV cannot escape responsibility for disciplinary action against employees by delegating that duty to a private entity." (App. B, *infra.*) Since Tarkanian was an employee of UNLV, the court reasoned that any act which affected his position as head coach was the performance of a function traditionally reserved to the state. Accordingly, the court held that NCAA was a state actor and its direction to UNLV that it report to the NCAA why it should not discipline Tarkanian for serious violations of its rules was an act traditionally reserved to the state.

The principal flaw in the court's ruling is its holding that Tarkanian's *employment* was affected by the NCAA. The sanction was against UNLV, and UNLV could have elected to suspend Tarkanian or to accept other sanctions. Further, his alleged tenure under Nevada law was for his position as a Professor of Physical Education, not as coach of the basketball team. Not satisfied with having tortured the first test of *Lugar*, the Nevada court mis-

construed the symbiotic relationship prong of the test to fit the facts of this case as well. In explanation, the court said only:

> By delegating authority to the NCAA over athletic personnel decisions and by imposing the NCAA sanctions against Tarkanian, UNLV acted jointly with the NCAA.

(App. B, *infra.*) *Lugar*, however, holds that the conduct of which Tarkanian complains must be fairly attributable to the state. Section 1983 requires further that it be established that the conduct was under color of state law and that the alleged deprivation "resulted from the exercise of a right, privilege, or rule of conduct having its source in state authority." *Gilmore v. Salt Lake Community Action Program*, 710 F.2d 632, 638 (10th Cir. 1983).

Here, the NCAA acted pursuant to and in enforcement of rules and procedures adopted by its members at annual conventions to insure minimum standards of scholarship, sportsmanship and amateurism in intercollegiate athletics. The NCAA rules were not a rule, regulation or policy of the State of Nevada. For the benefit of the Nevada Supreme Court and other similarly inclined courts, the membership of the NCAA has tremendous need for a clear pronouncement of the association's status as a state actor in carrying out its function of promulgating and enforcing the rules governing intercollegiate athletics adopted by its members.

II. Procedural Due Process

In addition to finding the NCAA a state actor, the Nevada Supreme Court also held that when Tarkanian "hotly" contested the NCAA's evidence that he violated NCAA rules, and produced signed affidavits contradicting

some of that evidence, the NCAA could not rely on oral presentation of statements made by witnesses to its investigators to find the coach in violation. At a minimum, it held, the NCAA should have produced written affidavits of those persons on whose testimony it relied, and its failure to do so in this case violated Tarkanian's right to procedural due process.

This decision points up a problem that is often present in procedural due process analysis - that is, no matter what procedures are followed, an unsuccessful litigant can always claim he should have received more.

Procedural due process "unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria & Restaurant Workers Union, Local 473, AFL-CIO v. McElroy*, 367 U.S. 886, 895 (1961). It is flexible and calls for such procedural protections as the particular situation demands. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Reduced to its simplest terms, procedural due process requires "a person in jeopardy of serious loss [be given] notice of the case against him and an opportunity to meet it." *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976).

Neither Tarkanian nor the Court below contend that notice of the NCAA's allegations was inadequate. Rather, the question at issue is ultimately one of characterization. What opportunity to be heard must be afforded a college basketball coach before temporarily suspending him? Was Tarkanian given an opportunity to be heard at a meaningful time and in a meaningful manner?

To answer this, this Court requires three distinct factors be examined: First, the private interests that will be affected; Second, the risk of an erroneous deprivation through the procedure used and the probable value, if any, of additional or substitute safeguards; and finally,

the interest of the state actor, including the function involved and fiscal and administrative burdens that additional or substitute procedures would entail. *Mathews v. Eldridge, supra,* 424 U.S. at 335. We therefore look not only at the private interests affected, but also the interests of the state actor.

Unfortunately, the Court below focused only on the second factor. In holding that the NCAA must produce affidavits from its sources of information, the Nevada Supreme Court turned a microscope on one feature of the NCAA's enforcement procedure. By viewing one procedure in isolation, it missed the forest for the trees. Fault can be found with any set of procedures if the perspective is sufficiently myopic. The court below failed to view the whole framework to see if it was fundamentally fair. A brief review of all the protections afforded Tarkanian in this case will point up the fundamental fairness of the proceedings.

The NCAA, acting on information received, began its investigation of UNLV in 1972, before Tarkanian arrived. Following investigation by its Enforcement Division, the NCAA Committee on Infractions forwarded, pursuant to NCAA rules, an Official Inquiry to UNLV on February 25, 1976. The Official Inquiry set forth specific NCAA constitutional and bylaw provisions alleged to have been violated, followed by a recitation of specific acts relating to each specific allegation.[5] Some of these matters concerned Tarkanian.

UNLV, with the aid of Tarkanian, submitted a written response to the allegations. Thereafter, Tarkanian attended and participated in four administrative hearings before NCAA Committees. The first three hearings were presided over by the Committee on Infractions. The five

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5. The original Official Inquiry contains seventy-two allegations, and was supplemented by an Official Inquiry containing six additional inquiries.

members of the Committee on Infractions, who had served for many years and heard scores of cases, consisted of three law professors, and two academics from other disciplines.[6]

During the hearings, Tarkanian was allowed to have counsel present. He was allowed to question and cross-examine the investigators. He was allowed to present evidence and to argue his case. The hearings before the Committee, which took place over three days, totalled in excess of twenty hours.

Following the three hearings, the Committee notified UNLV of its findings and penalties on April 26, 1977. The Committee found thirty-eight violations by the University, including several by Tarkanian. Among other sanctions assessed, the university was ordered to show cause why Tarkanian should not be suspended from coaching intercollegiate basketball for two years.

The University exercised its right of appeal to the sixteen member NCAA Council. Both Tarkanian and the Committee on Infractions were permitted to make written and oral presentations to the Council. The Committee on Infractions prepared and presented to the Council the "Expanded Confidential Report," which detailed each violation and the evidence on which each finding was made. (App. R, *infra.*) Oral argument on the appeal was heard by the NCAA Council in August, 1977. The Council then deliberated, and voted 16-0 to adopt the Committee on Infractions' findings and sanctions.

Tarkanian had yet another opportunity to be heard. Pursuant to NCAA rule, a hearing was scheduled and con-

6. The members of Committee were Charles Alan Wright, constitutional expert and Professor of law at the University of Texas, William Mathews, Professor of law at the University of Kentucky, Harry M. Cross, Professor of law and Associate Dean at the University of Washington, John W. Sawyer, Professor of mathematics at Wake Forest University and Arthur Reynolds, Dean of the Graduate School, University of Northern Colorado.

ducted by UNLV. (App. O, *infra.*) Again, Tarkanian was given an opportunity to present evidence, to question and cross-examine witnesses, and to show cause why he should not be temporarily suspended. He was represented by counsel. Following the hearing, UNLV determined that it would adopt the findings and penalties of the NCAA. (App. P, Q, *infra.*) The next day, Tarkanian filed suit in Nevada state court.

In short, Tarkanian attended and participated in five hearings at which he was provided the opportunity to be heard at a meaningful time and in a meaningful manner. At each of the hearings, he was provided: 1) the opportunity to be represented by counsel; 2) the opportunity to make an oral presentation in response to each specific allegation concerning him; 3) the opportunity to present affidavits, witness statements and any other documents he wished; 4) the opportunity to question and cross-examine the members of the investigative staff; 5) the opportunity to have his case presented to and determined by independent finders of fact; and 6) an opportunity to appeal to another body. Clearly, Tarkanian understoood the charges against him and received ample opportunity to refute those charges and present his case. The gravamen of his complaint is that he was not successful, despite being given the opportunity to succeed.

The opinion of the Court below in this case conflicts with the method of analysis established in this Court's cases and with the holdings of the Circuit Courts of Appeals which have reviewed the NCAA's procedures. The Nevada Supreme Court rejected the considered view of the Eighth Circuit and the District of Columbia Circuit that NCAA enforcement procedures comply with the mandates of procedural due process. In *Howard University v. NCAA*, 510 F.2d 213 (D.C. Cir. 1975), the Court reviewed the same procedures at issue today. It noted that the NCAA gave full notice and full particulars of the charges

alleged, the right to participate and defend the alleged violations before the Committee on Infractions, and the right to appeal an adverse ruling to the NCAA Council. "We think that the NCAA has complied adequately with any due process responsibilities it might have had." *Id.* at 222. In *Regents of University of Minnesota v. NCAA*, 560 F.2d 352 (8th Cir.), *cert. dismissed*, 434 U.S. 978 (1977), these same procedures were again reviewed and the Court there held that they "unquestionably afforded due process." *Id.* at 371.

Similarly, the Sixth Circuit has also reached a result contrary to that of the Nevada Supreme Court. In *Crook v. Baker*, 813 F.2d 88 (6th Cir. 1987), a case with issues similar to this case, the recipient of a master's degree challenged the University's decision to rescind the degree for alleged improprieties. As in the instant case, the plaintiff received written notice of the allegations against him, and an opportunity to present a written reply to those charges. Following a lengthy hearing before a committee of University professors, at which plaintiff appeared with counsel and examined witnesses, it was determined that the allegations were true. An appeal to the State Board of Regents was taken, and following a hearing, the findings were affirmed. The plaintiff challenged the findings in court, alleging the actions of the University did not comply with constitutional requirements of procedural due process. Following a lengthy trial, which included the transcripts of the earlier hearings, the trial court declared the procedures were inadequate, and found in plaintiff's favor. Ironically, the trial judge erroneously re-weighed the evidence in determining that the plaintiff had not violated University rules, just as the trial court in this case did. The Sixth Circuit, on review, reversed, noting not only that the procedures invoked met due process standards, but also that the trial judge had improperly substituted her judgment on the propriety of the sanctions levied by

the University for those of the fact-finding body assigned that task. The Court also chided the district court's personal criticisms of the University committee.

In sum, the court below departs from clear precedent in holding that NCAA procedures fail to provide due process protections. In focusing on one supposed deficiency, i.e., the lack of affidavits from NCAA sources, it ignores the tremendous amount of process Tarkanian did receive. It failed to balance the relative interests of the parties, or at best did so with its thumb on the scales. This analysis is contrary to this Court's requirements, as set out in *Mathews v. Eldridge*, thereby warranting review by this Court.

III. Substantive Due Process

The trial court below held that the NCAA's action in recommending Tarkanian's temporary suspension from coaching violated his right to substantive due process. Although this holding was briefed extensively to the Nevada Supreme Court, that Court affirmed the holding without comment. (App. B, *infra.*) We raise the issue for consideration by this Court only because the failure of the court below to eliminate it leaves uncertain its vitality.

The rights and interests which Tarkanian seeks to protect by this litigation spring from state law, i.e., his employment contract with the University and his rights, if any, under state tenure laws. The Circuit Courts of Appeals have disagreed about the availability of substantive due process review when deprivation of state conferred property rights are alleged. The Seventh and Tenth Circuits have held that substantive due process protects only constitutional rights, not state-created rights. *See Mangels v. Pena*, 789 F.2d 836, 839 (10th Cir. 1986); *Brown v. Brienen*, 722 F.2d 360, 367 (7th Cir. 1983). The Fifth, Eighth and Eleventh Circuits have held that sub-

stantive due process protects state rights as well as constitutional rights. *See Schaper v. City of Huntsville*, 813 F.2d 709, 717 (5th Cir. 1987); *Barnett v. Housing Authority*, 707 F.2d 1571, 1577 (11th Cir. 1983); *Moore v. Warwick Public School District No. 29*, 794 F.2d 322, 328-29 (8th Cir. 1986).

Justice Powell addressed this issue in his concurring opinion in *Regents of University of Michigan v. Ewing*, 474 U.S. ..... (1985). In *Ewing*, this Court considered the decision of a state university in dismissing a student from its medical program. The student was terminated after achieving on a national exam the lowest score in the history of the school's program. Joining this Court's unanimous opinion that the university had not violated the student's rights, Justice Powell contended that the student was not entitled to the protection of substantive due process, because his interest in a medical degree arose from state law rather than constitutional law. He wrote:

> Even if one assumes the existence of a property right, . . . not every such right is entitled to the protection of substantive due process. While property interests are protected by procedural due process even though the interest is derived from state law rather than the constitution, substantive due process rights are created only by the constitution.

Id., 474 U.S. at ..... (Powell, J., concurring) (citation omitted).

Tarkanian's interests arise from alleged state tenure and contract rights and therefore offer this Court an opportunity to address the concern of Justice Powell and the conflict among the several circuits cited above. For this reason, certiorari is warranted.

In addition, the holdings of the Nevada state courts that the NCAA's findings and sanctions were arbitrary also warrants this Court's consideration. The hallmark of substantive due process is that state action should not be arbitrary or capricious. *See, Ewing, supra*, 474 U.S. at ..... In an academic setting, "arbitrariness" must be established by showing that the decision is not supported by the facts, or that the reasons given for the decision are unrelated to the educational process. *See Fisher v. Snyder*, 476 F.2d 375, 377 (8th Cir. 1973); *Wishart v. McDonald*, 500 F.2d 1110, 1115 (1st Cir. 1974). Courts reviewing such decisions must not re-weigh the evidence or usurp the judgment of the academic fact finder, but rather should uphold the decisions they make unless unsupported by any evidence. *Wood v. Strickland*, 420 U.S. 308, 326 (1975).

UNLV and the other members of the NCAA, including Tarkanian, voluntarily agreed to conduct their intercollegiate athetic programs in accordance with rules governing the recruiting, admission, eligibilty and financial aid of student-athletes. They further agreed to settle controversies regarding violations of those rules by adjudication before a Committee composed of professors or administrators representing geographically and academically diverse member institutions. Those procedures were followed here. As head basketball coach at a member institution, Tarkanian agreed to this procedure. After arguing his case unsuccessfully through three proceedings before the Committee on Infractions plus additional hearings before the Council and the University (all with the assistance of counsel), Tarkanian sought the protection of his home court.

The trial judge below found that the five members of the NCAA Committee on Infractions and the 16 members of the Council did not have sufficient information to find the violations of which Tarkanian was accused. The trial judge made this determination despite evidence at trial that these committees had taken over 20 hours of testimony, had observed all the witnesses, including Tarkanian, had reviewed hundreds of documents and had

deliberated several hours before reaching their conclusions. In fact, this single man, the trial judge, substituted his judgment for the judgment of 21 others. Ironically, the trial judge did not have before him many of the witnesses who had appeared before these 21 committee members. He had before him none of the affidavits and documents presented by Tarkanian at the hearings before the Committees. The trial judge even indicated at trial that he would not read the transcripts of the hearings.

Even more ironic, this same judge, unbeknownst to petitioner, had been relieved of his judgeship shortly before oral argument of this case to the Nevada Supreme Court. He was forced to resign from the bench on the basis of emotional problems, based upon evidence that he had acted irrationally as a judge as long ago as 1984, the year in which this case was tried. At least one member of the Nevada Supreme Court sat on the committee which recommended his removal.

Thus, a man who was later found to be judicially incompetent was allowed, with the knowledge and acquiescence of the highest court of his state, to substitute his personal judgment, in favor of a popular, local personality, for that of 21 independent teachers and administrators who heard all of the evidence, viewed all of the documents and observed all of the witnesses.

This case brings to this Court the following question: Should the Nevada courts, without reviewing the evidence which had been considered by the designated fact finder, be allowed to substitute their judgment for that of the voluntary association whose rules are at issue. This Court can, and should, grant certiorari in order to answer this question in the negative.

IV. Removal

The NCAA seeks this Court's consideration of the rights of litigants to have the federal courts decide questions of U.S. Constitutional law. Specifically, the NCAA submits that the removal statute should be construed to permit U.S. District Courts to inquire whether a defendant was joined, or not joined initially, for the sole purpose of defeating removal.

The Nevada courts held, erroneously, we believe, that the NCAA's conduct was state action and that it deprived Tarkanian of constitutionally protected rights.

This Court has spoken in cases where the parties have colluded to create or destroy diversity jurisdiction.[7] Existing case law, however, has not settled the issue fairly in cases where parties have acted to defeat federal question jurisdiction.

In this case, it became increasingly clear as the litigation progressed that the joint and separate actions of Tarkanian and UNLV were designed to and succeeded in defeating the NCAA's right to have the federal courts decide Tarkanian's claim that he had been deprived of the protections guaranteed by the U.S. Constitution.[8] The

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7. *See, e.g., Mecom v. Fitzsimmons Drilling Co.*, 284 U.S. 183 (1931); *Kramer v. Caribbean Mills, Inc.*, 394 U.S. 823 (1969).

8. The "friendly" nature of the lawsuit brought by Tarkanian "against" the University originally, and the animosity of both Tarkanian and the University toward the NCAA concerning the matters which are the subject of this litigation, has persisted since the NCAA first began its investigation of allegations concerning Tarkanian. The University's hearing (following Tarkanian's hearing before the NCAA Council) was utilized as a forum for both the University and Tarkanian to attack the NCAA and set the stage for their forthcoming "friendly" lawsuit. Two days after this hearing, Tarkanian in fact filed suit. The NCAA was not named as a defendant in that suit. Despite well-founded and reasonable requests by the NCAA,

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NCAA twice unsuccessfully sought to remove this case to federal court.

Tarkanian brought suit "against" UNLV on September 8, 1977, claiming that UNLV's temporary suspension of his head coaching duties denied him rights guaranteed by the Fourteenth Amendment. The NCAA was not named as a defendant, and UNLV declined to remove the case to federal court. The Nevada Supreme Court later determined that the NCAA was an indispensable party to the action. (App. E, *infra.*) Within thirty days following the date the NCAA was joined as a defendant with the claim that the NCAA's enforcement procedures deprived

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Footnote continued—

the University refused to remove the case to federal court, preferring instead to remain in the state court of the home state of both itself and Tarkanian. This allowed Tarkanian and the University to "litigate" their case (at least initially) in their home court free from the encumbrances of such details as contested issues.

At the trial to consider an injunction against the University, attorneys for the University were allowed to testify regarding privileged matters *for Tarkanian* without objection by the University. Additionally, in its "defense" at the first trial, the University failed to proffer the Expanded Confidential Report, which constituted the written findings of the Committee on Infractions and which was among the most persuasive evidence the University had available to dispute Tarkanian's claims.

Following the granting of an injunction against it, the University reluctantly appealed the decision to the Nevada Supreme Court, which remanded the case and ordered joinder of the NCAA as a party. (Appendix E, *infra,* A61.)

At the 1984 trial of the case, the trial tactics of the University and the evidence offered by its employees and counsel finally and conclusively established its alliance with Tarkanian in their battle against enforcement of the findings and sanctions recommended by the Committee on Infractions and NCAA Council. At the close of the second trial, a permanent injunction was entered against the University, from which it has chosen not to appeal. At hearings on attorneys fees, both the University and Tarkanian argued that Tarkanian's case was mainly against the NCAA, the University noting that it would not have sought suspension of Tarkanian but for what it perceived to be a mandate of the NCAA.

plaintiff of rights guaranteed by the Fourteenth Amendment, however, defendants petitioned for removal of the case to federal court. The U.S. District Court remanded the case to state court, believing itself bound by those cases construing the removal statute which suggest that the right to removal was destroyed by UNLV when it failed to remove within thirty days of service of process in 1977. (App. H, *infra.*) Following trial of the case and receipt of the trial court's memorandum decision, a second petition for removal was filed based upon the clear evidence that Tarkanian's and UNLV's interests were identical. Although the court had earlier noted that "the true adversity of the original parties might reasonably be questioned," (App. H, *infra,* A79), the U.S. District Court again ordered remand. (App. J, *infra.*)

The trend in the analogous case law indicates such frustration of the policy of the removal statute by Tarkanian and UNLV was improper.

Prior to 1969, this Court had declined to inquire into the motives of a plaintiff in joining a defendant in order to create or destroy diversity jurisdiction.[9] This Court's holding in *Kramer v. Caribbean Mills, Inc.,* 394 U.S. 823 (1969), however, engaged in just such an inquiry. *Kramer* held that the U.S. District Court lacked diversity jurisdiction because an assignment of a contractual interest to the plaintiff, admittedly motivated in substantial part by a desire to make diversity jurisdiction available, had been "improperly or collusively made" to invoke jurisdiction, within the meaning of 28 U.S.C. §1359.[10] *Id.* at 830.

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9. *See, e.g., Provident Savings Life Assurance Society v. Ford,* 114 U.S. 635, 641 (1885); *Oakley v. Goodnow,* 118 U.S. 43, 44 (1886); *Mecom v. Fitzsimmons Drilling Co.,* 284 U.S. 183, 189 (1931).

10. The statutory provision construed by this Court in *Kramer,* 28 U.S.C. §1359, provides:

> A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court.

Many lower federal courts seem to have accepted the *Kramer* case as burying *Mecom* and its predecessors.[11]

In *Miller v. Perry, supra,* 456 F.2d at 67, the Fourth Circuit concluded that, under *Kramer,* federal courts are now free to inquire into the motives of those seeking appointment of administrators for the purpose of either *creating or prohibiting* federal court diversity jurisdiction. The *Miller* court recognized that the difference between collusive attempts to create and to destroy diversity jurisdiction "is insignificant." *Id.* at 66.[12]

The difference between collusive attempts to avoid removal on grounds of diversity jurisdiction and collusive attempts to avoid removal on grounds of the existence of a federal question seems equally significant.[13] In both

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11. *See, e.g., Pallazola v. Rucker,* 797 F.2d 1116, 1120 (1st Cir. 1986); *O'Brien v. Avco Corp.,* 425 F.2d 1030, 1033 (2nd Cir. 1969); *Prudential Oil Corp. v. Phillips Petroleum Co.,* 546 F.2d 469, 474 (2nd Cir. 1976); *Miller v. Perry,* 456 F.2d 63, 67 (4th Cir. 1972); *Bishop v. Hendricks,* 495 F.2d 289, 296 (4th Cir.), *cert. denied,* 419 U.S. 1056 (1974); *Bass v. Texas Power & Light Co.,* 432 F.2d 763 (5th Cir. 1970), *cert. denied,* 401 U.S. 975 (1971); *Bianca v. Parke-Davis Pharmaceutical Div.,* 723 F.2d 392, 395 (5th Cir. 1984); *Gross v. Hougland,* 712 F.2d 1034, 1037 (6th Cir. 1983), *cert. denied,* 465 U.S. 1025 (1984); *Betar v. DeHavilland Aircraft of Canada, Ltd.,* 603 F.2d 30, 33 (7th Cir. 1979), *cert. denied,* 444 U.S. 1098 (1980); *North Amer. Watch Corp. v. Princess Ermine Jewels,* 786 F.2d 1447, 1450 (9th Cir. 1986); *Hackney v. Newman Memorial Hospital, Inc.,* 621 F.2d 1069, 1070 (10th Cir.), *cert. denied,* 449 U.S. 982 (1980). *See also Piquet v. Amoco Production Co.,* 513 F.Supp. 938, 942 (M.D.La. 1981). *But cf. Field v. Volkswagenwerk AG,* 626 F.2d 293, 303 (3rd Cir. 1980); *Krier-Hawthorne v. Beam,* 728 F.2d 658, 661 (4th Cir. 1984).

12. *See also Wecker v. National Enameling & Stamping Co.,* 204 U.S. 176, 186 (1907) ("[T]he federal courts should not sanction devices intended to prevent a removal to a federal court where one has that right . . . ."); *Vidmar Buick Co. v. General Motors Corp.,* 624 F.Supp. 704, 707 (N.D.Ill. 1985); *Douglas Energy of New York Inc. v. Mobil Oil Corp.,* 585 F.Supp. 546, 548 (D.Kan. 1984).

13. Indeed, collusive attempts to avoid removal of cases involving federal question jurisdiction are clearly more abhorrant in light of the clear congressional intent, expressed in 28

(Continued on following page)

situations, the courts should examine the facts in order to determine whether collusion is being utilized to defeat federal court jurisdiction. To date, courts feel bound by judicially created law which forbids such inquiry in federal question cases, but rather requires rote adherence to the notion that all parties designated by plaintiff as defendants must join in removal.[14]

Under the law as it stands, regardless of their rights granted by 28 U.S.C. §1441 to litigate in federal court, a defendant joined in a suit after a friendly defendant has declined to remove is powerless to remove because of the case law holding that the original non-adverse defendant waived the removal rights of *all* defendants. Thus, the law as it now stands would seem to allow a plaintiff with a claim arising under the laws of the United States to sue in state court a non-adverse party for redress of such a claim and wait until the time for removal has lapsed before joining his true adversary.

This Court has the power to and should construe the removal statute to allow U.S. District Courts to consider and weigh the interests of defendants who seek to remove cases involving real issues of federal law, regardless of when such defendants are made parties to such suits, rather than construing the statute to allow non-adverse defendants to waive and destroy forever and for all subsequent defendants the right to litigate such questions in the federal courts. This presents an appropriate question for this Court to consider.

Footnote continued—

U.S.C. §1441(b), that litigants be provided a federal forum for resolution of issues involving federal questions "without regard to the citizenship or resident of the parties." 28 U.S.C. §1441(b).

14. *See, e.g.,* 1A J. Moore, *Moore's Federal Practice* ¶0.168 [3.-2], p. 547 (1987); *Godman v. Sears, Roebuck & Co.,* 588 F. Supp. 121, 123 (E.D. Mich. 1984); App. H, *infra,* A77.

CONCLUSION

The writ of certiorari should issue.

Respectfully submitted,

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Supreme Court, U.S.
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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Petitioner,

vs.

JERRY TARKANIAN,
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

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APPENDIX

DOCUMENT A

SUPREME COURT OF THE UNITED STATES

No. A-395

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Applicant,

v.

JERRY TARKANIAN

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 25, 1987.

/s/ Sandra D. O'Connor
Associate Justice of the Supreme
Court of the United States

Dated this 21st day of November, 1987.

DOCUMENT B

(Filed August 27, 1987)

IN THE
SUPREME COURT OF THE STATE OF NEVADA

No. 16256

JERRY TARKANIAN, UNIVERSITY OF NEVADA, LAS VEGAS; DR. LEONARD GOODALL, as President of the University of Nevada, Las Vegas and Officer of the University of Nevada; FRANKIE SUE DEL PAPA, LILLY FONG, DOROTHY GALLAGHER, CHRIS KARAMANOS, JOAN DENNEY, DANIEL J. KLAICH, JOHN McBRIDE, JOANN SHEERIN and JUNE WHITELY as Members of the Board of Regents of the University of Nevada,
Appellants and Cross-Respondents.

vs.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Respondent and Cross-Appellant.

Appeal from injunction prohibiting suspension of Jerry Tarkanian as UNLV Basketball Coach; cross-appeal from denial of attorney's fees as damages; appeal from order granting attorney's fees as costs pursuant to 42 U.S.C. § 1988. Eighth Judicial District Court, Clark County; Paul S. Goldman, District Judge.

Reversed in part, affirmed in part, remanded.

OPINION

PER CURIAM:

This is the second appeal in litigation involving Jerry Tarkanian's suspension as head basketball coach at the University of Nevada-Las Vegas (UNLV). The trial court granted Tarkanian injunctive relief because of the NCAA's failure to comply with due process standards. The trial court also awarded Tarkanian attorney's fees pursuant to 42 U.S.C. § 1988. We affirm in most respects, reversing and remanding only for recomputation of attorney's fees.

THE FACTS

The NCAA is a private, voluntary association consisting of approximately 960 public and private educational institutions. The NCAA Council, which is elected at annual conventions, is responsible for implementation and interpretation of NCAA policies. The NCAA Committee on Infractions administers the NCAA enforcement program.

UNLV is a public university existing by virtue of Article 11, Section 4 of the Nevada Constitution. Jerry Tarkanian has been a head basketball coach for nearly thirty years, at UNLV since 1973.

After a two and one-half year investigation of UNLV's basketball program, the Committee on Infractions issued to UNLV an Official Inquiry on February 25, 1976. The Official Inquiry was fifty-four pages in length and outlined seventy-two rule violations which allegedly occurred between 1970 and 1976. The Official Inquiry was later supplemented with six additional allegations. UNLV was requested to conduct its own investigation and respond

by June 1, 1976. The Nevada State Attorney General's Office conducted an extensive investigation of the allegations. The individuals named in the Official Inquiry were located, and attorney general personnel either traveled to their homes or flew them to Las Vegas for interviews.

UNLV submitted to the Committee on Infractions a response consisting of a restatement of each allegation and an explanation whether UNLV agreed that a violation occurred. UNLV also submitted two boxes of sworn statements, affidavits and other documentary evidence supporting denials of rule violations.

The Committee on Infractions considered the allegations in hearings covering approximately a three-day period. The NCAA enforcement staff's evidence consisted of the investigators' oral recollections of interviews with sources. The investigators relied on memoranda of the interviews, sometimes dictated after the interviews. The interviewees did not check the accuracy of the memoranda. With respect to the allegations against Tarkanian, UNLV affidavits and sworn statements directly controverted the testimony of the NCAA enforcement staff.

Of the seventy-eight allegations, the Committee found thirty-eight violations of NCAA rules. Tarkanian was named in ten of the violations. The Committee issued its findings in Confidential Report No. 123(47), which directed UNLV to show cause why additional penalties should not be imposed against it if it did not suspend Tarkanian from involvement with the University's Intercollegiate Athletic Program for two years.

UNLV appealed certain findings and penalties to the NCAA Council in May, 1977, including all involving

Tarkanian. The Council affirmed the findings and penalties of the Committee on August 23, 1977. In September, 1977, UNLV conducted a hearing to determine whether to follow the NCAA's directive. The hearing officer questioned the factual basis of the charges against Tarkanian, but felt UNLV had no choice but to accept the penalties in the Confidential Report. UNLV's President accepted the hearing officer's recommendation and suspended Tarkanian.

Tarkanian brought suit against UNLV in September, 1977 and obtained injunctive relief. This court reversed for failure to join a necessary party, the NCAA. University of Nevada v. Tarkanian, 95 Nev. 389, 594 P.2d 1159 (1979). Tarkanian commenced a second suit in July, 979, against both UNLV and the NCAA. The trial court granted Tarkanian injunctive relief but denied Tarkanian's claim for attorney's fees as damages under state law. The trial court, however, did allow attorney's fees as costs pursuant to 42 U.S.C. § 1988.

DISCUSSION

State Action.

The NCAA first contends that UNLV's and the NCAA's imposition of penalties against Tarkanian does not constitute state action.

Due process restrictions apply only to activities which can be characterized as state action.[1] Early cases held that NCAA regulatory activity constituted state action.

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1. The "under color of law" requirement of 42 U.S.C. § 1983 is identical to the state action requirement of the Fourteenth Amendment. Rendell-Baker v. Kohn, 457 U.S. 830, 838 (1982). The parties use both terms, but for convenience' sake, we will refer only to state action.

See, e.g., Regents of the Univ. of Minn. v. N.C.A.A., 560 F.2d 352 (8th Cir. 1977), *cert. denied*, 434 U.S. 978 (1977); Howard University v. N.C.A.A., 510 F.2d 213 (D.C. Cir. 1975); Parish v. N.C.A.A., 506 F.2d 1028 (5th Cir. 1975); Associated Students, Inc. v. N.C.A.A., 493 F.2d 1251 (9th Cir. 1974). The rationale underlying these cases was that many NCAA member institutions were either public or government supported. Rivas Tenorio v. Liga Atletica Interuniversitaria, 554 F.2d 492, 495 (1st Cir. 1977). However, the NCAA argues that a trilogy of 1982 Supreme Court decisions and cases subsequently interpreting them require a different result. We disagree.

The Supreme Court cases on which the NCAA relies are Rendell-Baker v. Kohn, 457 U.S. 830 (1982), Lugar v. Edmondson Oil Company, Inc., 457 U.S. 922 (1982), and Blum v. Yaretsky, 457 U.S. 991 (1982).

In *Blum*, medicaid patients in private nursing homes challenged the decision of physicians to transfer them to lower levels of care without notice or a hearing. 457 U.S. at 1006. The Court held that due process limitations did not apply because government regulations did not dictate the decision to transfer. Rather, private physicians determined whether the patient's care was medically necessary based upon professional standards. *Id.* at 1006-08. The Court stated that "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Id.* at 1004. The Court further noted that mere regulation, subsidization, or acquiescence in the initiatives of a private party do not create state action. *Id.*

In *Rendell-Baker*, the Court relied upon similar reasoning to hold that a private high school for maladjusted students did not act under color of law when it discharged teachers. The Court reached this conclusion even though the school was governmentally regulated and received most of its students by referral from public schools, and public funds had accounted for over ninety percent of its budget. 457 U.S. at 832-33.

In *Lugar*, the Court determined that a private party's joint participation with state officials in the seizure of disputed property constituted action under color of state law. The Court interpreted its cases to require "that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State." 457 U.S. at 937. This inquiry contains a two-part approach:

> First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.

Id. at 937.

Cases subsequent to *Blum*, *Rendell-Baker*, and *Lugar* have rejected the earlier line of cases which held that NCAA regulatory activity is state action. In Arlosoroff v. N.C.A.A., 746 F.2d 1019 (4th Cir. 1984), a Duke University tennis player challenged NCAA eligibility requirements. In holding that the state action requirement was

not met, the court said that it could not be shown that state schools joined as a bloc to cause the bylaw in question to be adopted. Thus the coercive power test explained in *Blum* was not met, and the court found no state action. 746 F.2d at 1022. *Arlosoroff* specifically rejected the earlier line of cases which held that NCAA regulatory activity is state action. *Id.* at 1021. *See also* Graham v. N.C.A.A., 804 F.2d 953 (6th Cir. 1986); Ponce v. Basketball Federation, 760 F.2d 375 (1st Cir. 1985); McHale v. Cornell Univ., 620 F. Supp. 67 (N.D.N.Y. 1985).

The *Blum* trilogy and cases subsequently interpreting it do not require the result which the N.C.A.A. urges. Both *Blum* and *Rendell-Baker* recognized that state action may be present "if the private entity has exercised powers that are 'traditionally the exclusive prerogative of the state.'" *Blum,* 457 U.S. at 1005 (quoting Jackson v. Metropolitan Edison Co., 419 U.S. at 345, 353 (1974)); *see also Rendell-Baker,* 457 U.S. at 842. UNLV is a public institution, existing by virtue of Article 11, section 4 of the Nevada Constitution. Tarkanian is therefore a public employee. In our view, the right to discipline public employees is traditionally the exclusive prerogative of the state. UNLV cannot escape responsibilty for disciplinary action against employees by delegating that duty to a private entity.

The *Arlosoroff* court held that the regulation of intercollegiate athletics is not a function traditionally exclusively reserved to the state. *See also Rendell-Baker,* 457 U.S. at 842 (while education is a public function, it has not been traditionally the exclusive function of the state). However, the facts of the instant case are distinguishable from *Arlosoroff* and other cases cited by the NCAA in that those cases concerned private schools. *See Arlosoroff,* 746

F.2d 1019 (applicability of NCAA eligibility requirements to Duke University tennis player); *McHale,* 620 F. Supp. 67 (applicability of NCAA eligibility requirements to Cornell University student). Graham v. National Collegiate Athletic Ass'n, 804 F.2d 953 (6th Cir. 1986), on which the NCAA relies in its supplemental points and authorities, is also distinguishable. *Graham* did not deal with the enforcement of NCAA rules against a state employee, as in the instant case.

For similar reasons, the two-part approach articulated in *Lugar* requires that we conclude state action is present. The first prong is met because no third party could impose disciplinary sanctions upon a state university employee unless the third party received the right or privilege from the university. Thus, the deprivation which Tarkanian alleges is caused by the exercise of a right or privilege created by the state. Also, in the instant case, both UNLV and the NCAA must be considered state actors. By delegating authority to the NCAA over athletic personnel decisions and by imposing the NCAA sanctions against Tarkanian, UNLV acted jointly with the NCAA.

Property or Liberty Interest.

The protections of due process attach only to deprivations of property or liberty interests. Sullivan v. Brown, 544 F.2d 279, 282 (6th Cir. 1976). The NCAA argues that Tarkanian did not possess a constitutionally protected property or liberty interest. We disagree.

In Board of Regents v. Roth, 408 U.S. 564, 577 (1972), the Supreme Court stated that property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure

certain benefits and that support claims of entitlement to those benefits." A contract for employment can be the basis of a property right. Stewart v. Bailey, 556 F.2d 281, 285 (5th Cir. 1977).

In our view, Tarkanian's contractual relationship with UNLV establishes a property interest in continued employment. Since July, 1973, Tarkanian had been employed under a series of one-year contracts running from July through June. His 1977-1978 contract was entitled "Tenured Professional Employment Document." This contract, which was dated June 20, 1977 and was for a term running from July 1, 1977 through June of 1978, was a continuation of an established practice between the parties. The contract granted Tarkanian tenure, thus confirming his testimony that upon arrival at UNLV he was promised tenure would be given at some time in the future. This contract was in force when UNLV suspended Tarkanian in September, 1977.

The NCAA argues that Tarkanian was not deprived of a property interest because the suspension affected only his duties as head coach. According to his 1977-1978 contract, Tarkanian held the positions of both head basketball coach and professor of physical education. Case law supports that employees do not have a property interest in a particular position. *See e.g.*, Childers v. Independent School Dist. No. 1, 676 F.2d 1338, 1341 (10th Cir. 1982); Sullivan v. Brown, 544 F.2d 279, 282 (6th Cir. 1976). Given the facts of this case, this argument is not persuasive. Tarkanian had been a head basketball coach for twenty-eight years, four at UNLV. Continued employment only as a professor of physical education would be a drastic change from his previous assignment.

We also believe that Tarkanian possessed a liberty interest protected by the due process clause. The Supreme Court defined the parameters of the due process liberty interest in *Paul v. Davis*, 424 U.S. 693, *reh'g denied*, 425 U.S. 985 (1976). In *Davis*, the Court held that in order to invoke the protections of the due process liberty interest, a plaintiff must show that a "right or status previously recognized by state law was distinctly altered or extinguished" and that his reputation was injured as a result. *Id.* at 711. This test has become known as the "stigma-plus" test, the stigma being an injury to reputation, the plus being a change in a previously recognized status. The NCAA is unpersuasive in contending that Tarkanian fails both prongs of the test.

The stigma which satisfies the "stigma-plus" test in the employment context must be such that it forecloses plaintiff's opportunity to take advantage of other employment opportunities. Altman v. Hurst, 734 F.2d 1240, 1243 (7th Cir. 1984), *cert. denied*, 469 U.S. 982 (1984); Bollow v. Federal Reserve Bank, 650 F.2d 1093, 1101 (9th Cir. 1981), *cert. denied*, 455 U.S. 948 (1982). Dismissal from employment on grounds involving immorality or dishonesty satisfies the stigma prong of the stigma-plus test. Lawson v. Sheriff, 725 F.2d 1136, 1139 (7th Cir. 1984). The grounds for suspending Tarkanian satisfy this standard.[2]

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2. The NCAA's findings against Tarkanian included that (1) he arranged for a student to get a "B" grade without attending class or doing class work; (2) he attempted to impede the NCAA's investigation by discouraging individuals from providing information and encouraging individuals to provide false information; (3) he provided free airline transportation to a student-athlete; (4) he reimbursed an individual's expenses for recruiting a student-athlete; (5) he falsely certified UNLV's program as in compliance with NCAA rules; and (6) his conduct did not comport with high ethical standards.

The NCAA also contends that Tarkanian has not suffered a sufficient change of status. As already noted, however, even though Tarkanian would have retained employment as a professor, the NCAA's disciplinary action would have drastically altered his position. *Cf.* Hardiman v. Jefferson County Bd. of Educ., 709 F.2d 635 (11th Cir. 1983) (one week suspension without pay insufficient to invoke due process protections); Mosrie v. Barry, 718 F.2d 1151 (D.C. Cir. 1983) (lateral transfer to less desirable district insufficient to invoke due process protections). Absent judicial intervention, Tarkanian's suspension might well have ended his college coaching career.

Due Process.

The NCAA contends that the trial court erred in finding that the manner in which Tarkanian was suspended did not afford due process of law. We disagree.

In the hearings before the Committee on Infractions, the NCAA enforcement staff presented orally the NCAA's case. The investigators' presentation consisted of their recollections of interviews with sources. The investigators relied upon notes of the interviews, sometimes dictated after the fact. Tarkanian and UNLV hotly contested virtually all of the testimony which allegedly established rule violations by Tarkanian, and they presented evidence directly contradicting the investigators' testimony, generally consisting of signed affidavits and statements from persons whom the NCAA had interviewed. In the circumstances of this case, this procedure does not comport with due process requirements.

Procedural due process requirements are flexible and vary as the particular situation demands. Mathews v. Eldridge, 424 U.S. 319, 334 (1976). In *Mathews*, the Court

held that three competing interests should be balanced in determining what process is due:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.

A case on point is Stanley v. Big Eight Conference, 463 F. Supp. 920 (W.D. Mo. 1978). In *Stanley*, the plaintiff sought to enjoin the Big Eight Conference, working in cooperation with the NCAA, from conducting a hearing to determine if Oklahoma State University athletic personnel had violated rules of the Conference and the NCAA. The court granted injunctive relief.

In *Stanley*, the court noted the severe impact on coaching personnel when they are found to have violated the rules governing their activities. *Id.* at 926-27, 930. We have already discussed this point in the context of Tarkanian's liberty or property interest and will not repeat it here. We only reiterate our view that Tarkanian's suspension likely would have ended his near thirty-year career as a head coach and permanently tarnished his reputation. He no doubt possessed a significant interest in the outcome of the NCAA proceedings, an interest which cannot be taken lightly.

We next consider the nature of the fact-finding procedures employed by the NCAA. In *Stanley*, the fact-

finding body intended to rely upon as evidence of wrongdoing an investigator's eighteen page report detailing interviews with approximately seventy-five people. *Id.* at 924. The court held the procedures to be unconstitutional, stating:

> Of greatest concern to the Court is that the author of the investigative report is free to draw certain inferences beyond those statements of fact made to him in his interviews.
>
> . . . .
>
> . . . Furthermore, the author of the report presents statements made to him in a fashion that may not necessarily be prejudicial or biased but may certainly be classified as not completely neutral. It is this unconscious subjective coloring of the statements that troubles the Court. Accurate findings of fact should not be made upon pre-digested information.

Id. at 931.

There are significant similarities between this case and *Stanley*, and we are persuaded by *Stanley's* reasoning. *Stanley* involved a substantial investigation, with seventy-five people interviewed. The NCAA's investigation of Tarkanian and UNLV spanned approximately a two and one-half year period and resulted in fifty-eight pages of typed material detailing seventy-eight allegations of infractions. Also, in *Stanley*, the plaintiff denied the allegations pertaining to him. In the instant case, Tarkanian not only denied the allegations, he produced numerous sworn statements directly contradicting the testimony of the NCAA's investigators. In these circumstances, basing findings of fact upon pre-digested information creates serious due process problems. The lengthy

and far-reaching scope of the NCAA's investigation in this case creates the danger that the enforcement staff may not remember the precise nature of interviews. This increases the likelihood that investigators, no matter how pure their intentions, will gloss their testimony with an "unconscious subjective coloring." Also, despite the NCAA's desire to make the investigation a cooperative effort, the proceedings obviously became adversarial. Again, this enhances the likelihood that pre-digested information will be presented in a fashion favorable to the investigator-witness's position. As the court noted in *Stanley*, "[f]ew investigative reports can be written in a totally objective manner void of the author's subjective attitudes." *Id.* at 931 n.4.

Alternative procedures for protecting Tarkanian's interest are available. At a minimum the NCAA should be required to produce written affidavits of persons interviewed by the enforcement staff. This would attenuate the problem of a "subjective coloring" of the facts.

Attorney's fees.

The NCAA next argues that the trial court erred in awarding attorney's fees pursuant to 42 U.S.C. § 1988 (1982). Section 1988 allows the court in its discretion to award a party prevailing in a 42 U.S.C. § 1983 (1982) action a reasonable attorney's fee as a part of the costs. The NCAA argues that Tarkanian pleaded only in his complaint violations of the Fourteenth Amendment, without mentioning § 1983, and therefore cannot recover attorney's fees pursuant to § 1988. We disagree.

A cause of action under § 1983 requires an allegation that someone deprived the plaintiff of a federal right under color of state law. Gomez v. Toledo, 446 U.S. 635, 638

(1980). Tarkanian's complaint met these criteria, even though his complaint did not mention § 1983. This is a sufficient basis for obtaining attorney's fees. *See* Kirchberg v. Feenstra, 708 F.2d 991, 1000 (5th Cir. 1983); Harradine v. Board of Supervisors, 425 N.Y.S.2d 182, 188 (App. Div. 1980) (plaintiff may recover attorney's fees pursuant to § 1988 in a state court action which does not allege violation of § 1983, but seeks to enforce federal rights).

The NCAA also contends that the trial court erred by awarding attorney's fees for claims upon which Tarkanian did not prevail. Tarkanian's complaint sought redress for violation of both First and Fourteenth Amendment rights. Because the trial court made findings only on violation of Tarkanian's Fourteenth Amendment rights, the NCAA argues that he did not prevail on his First Amendment claim and the attorney's fees award should be reduced proportionately. We disagree. Tarkanian's claims for relief are not so easily separated. Both involve a common core of facts and are based on closely related legal theories. Moreover, Tarkanian obtained all the relief he hoped to obtain. *See* Hensley v. Eckerhart, 461 U.S. 424, 440 (1983) ("Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised.").

The NCAA next asserts that the trial court erred by awarding attorney's fees for a phase of the litigation in which Tarkanian did not prevail. We agree. Tarkanian initially sued only UNLV. On appeal, this court reversed Tarkanian's favorable judgment for failure to join a necessary party, the NCAA. University of Nevada v. Tarkanian, 95 Nev. 389, 594 P.2d 1159 (1979). Nonetheless

the trial court award attorney's fees against the NCAA in favor of Tarkanian for fees expended during the first trial.

Section 1988 allows recovery of fees only to a prevailing party. In our view, the first trial is a distinct phase of this litigation in which Tarkanian did not prevail. *See* Doulin v. White, 549 F. Supp. 152 (E.D. Ark. 1982). The district court erred in awarding fees to Tarkanian for that phase of this litigation. On remand, the trial court shall reduce attorney's fees accordingly.

The trial court also awarded Tarkanian an additional $5,000.00 in fees that was not supported by the billing records submitted. Because there was no evidence to support this amount, it shall likewise be eliminated.

Tarkanian submitted detailed records to establish attorney's fees, and except as noted, the trial court did not abuse its discretion in fixing the amount of fees awarded. Because some attorney's fees were appropriate pursuant to § 1988, it is unnecessary to consider Tarkanian's cross-appeal for fees as damages under state law.

Testimony of Charles Alan Wright.

The NCAA contends on appeal that the trial court erred in refusing to grant a continuance in order to allow Charles Alan Wright to testify. The NCAA also asserts that the trial court should have admitted a transcript of Mr. Wright's prior testimony before a congressional sub-committee. Mr. Wright is a noted law professor and was a member of the Committee on Infractions. The NCAA argues that the trial court's failure to allow his testimony warrants reversal. We reject the NCAA's argument. Three members of the Committee on Infractions

testified at trial, two of whom were law professors. In these circumstances, even if the trial court did err, we fail to see how the NCAA was prejudiced.

The Trial Court Injunction.

Finally the NCAA argues that the trial court's order granting injunctive relief is overly broad. We agree that the order does contain some confusing language. We are certain, however, that the trial court intended only to prohibit enforcement of the penalties imposed upon Tarkanian in Confidential Report No. 123(47) and UNLV's adoption of those penalties. To the extent the trial court's order may be given a broader interpretation, we modify its meaning to comport with this intention.

We have considered the NCAA's remaining contentions and conclude they lack merit.

/s/ Gunderson, C.J.
Gunderson
/s/ Steffen, J.
Steffen
/s/ Young, J.
Young
/s/ Springer, J.
Springer
/s/ Mowbray, J.
Mowbray

DOCUMENT C

(Filed June 25, 1984)

CASE NO. A173498
DEPARTMENT NO. X
CIVIL DOCKET K

IN THE
EIGHTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF CLARK

JERRY TARKANIAN,
Plaintiff,

vs.

UNIVERSITY OF NEVADA; UNIVERSITY OF NEVADA, LAS VEGAS; DR. LEONARD GOODALL, as President of the University of Nevada, Las Vegas, and Officer of the University of Nevada; and FRANKIE SUE DEL PAPA, LILLY FONG, DOROTHY GALLAGHER, CHRIS KARAMANOS, JOAN KENNEY, DANIEL J. KLAICH, JOHN McBRIDE, JOANN SHERRIN and JUNE WHITE[illegible], as Members of the Board of Regents of the University of Nevada; and the NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, an unincorporated association,
Defendants.

PRELIMINARY STATEMENT, FINDINGS OF FACT, CONCLUSIONS OF LAW, OPINION, ORDER AND JUDGMENT

PRELIMINARY STATEMENT

The Plaintiff (hereinafter "Tarkanian") filed this suit on September 8, 1977, against the University of Ne-

vada, Las Vegas (hereinafter "UNLV"), the then-President of that University, and the then-Members of the Board of Regents of that University, seeking, *inter alia*, to enjoin the enforcement of a sanction required of UNLV by the National Collegiate Athletic Association (hereinafter "NCAA").

On October 12, 1977, based upon a "STIPULATION OF FACTS" and brief testimony by the Plaintiff and four (4) other persons, Tarkanian successfully enjoined UNLV from carrying out the NCAA-mandated sanction, which sanction required of UNLV, the "complete severance of any and all relations Tarkanian may have, formally or informally, with the University's intercollegiate athletic program during the period [two years] of the University's probation, including, but not limited to, activities associated with administration, supervision, coaching, recruiting, athletic booster groups and public relations or fund-raising activities related to the University's athletic program." The University appealed.

On May 17, 1979, then-Chief Justice Mowbray of the Nevada Supreme Court reversed and remanded the matter for joinder of the NCAA in compliance with the Nevada Rules of Civil Procedure, Rule 19 (a), and to "serve the interest of judicial efficiency by precluding subsequent litigation. . . ." The NCAA had appeared as "amicus curiae" before the Supreme Court of the State of Nevada; the other four members of that Court had concurred with the Chief Justices's opinion and action.

Tarkanian filed a "SECOND AMENDED AND SUPPLEMENTAL COMPLAINT" on July 23, 1979; UNLV filed its "ANSWER TO SECOND AMENDED AND SUPPLEMENTAL COMPLAINT" on March 28, 1980; and

NCAA filed its "DEFENDANT NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ANSWER TO PLAINTIFF'S SECOND AMENDED AND SUPPLEMENTAL COMMPLAINT [sic]" on August 10, 1983. Numerous pretrial matters and disputes had to be resolved before the second trial could proceed, including NCAA's oral motion for a continuance.

The parties stipulated that the provisions of Rule 41(e) of the Nevada Rules of Civil Procedure were waived on May 11, 1982.

Trial of this present litigation commenced on June 11, 1984, and was concluded on June 22, 1984. What follows then, arises out of, and is the result of, this last (and hopefully final) trial.

FINDINGS OF FACT

1. The Plaintiff is a tenured professor at UNLV at an annual salary of $53,000.00 (approximate).

2. The Plaintiff is also the Head Basketball Coach at UNLV, for which he is annually paid (in lieu of his salary as a professor) $125,000, plus 10% of the net proceeds received by UNLV for participation in NCAA-authorized championship games, plus fees from basketball camps and clinics, product endorsements, and income realized from writing a newspaper column, speaking on a radio program entitled "THE JERRY TARKANIAN SHOW," and appearing on a television program bearing the same name.

3. The various sources of the Plaintiff's income as described in paragraph 2 of these FINDINGS OF FACT are entirely contingent on the Plaintiff's continued status as the Head Basketball Coach at UNLV.

4. The Plaintiff received approximately $1,600.00 for basketball clinics and camps and product endorsements during Calendar Year 1983, in addition to his $125,000 salary; no evidence was offered as to the exact amount of any other possible sources of income; the Plaintiff is "compensated" for his participation in the newspaper column, the radio talk show and the television show.

5. The Plaintiff has been a basketball coach for twenty-eight (28) consecutive years, and is the "winningest" active basketball coach at the present time.

6. The Defendant UNLV is a legal and corporate entity organized and existing under and by virtue of, Article II, Section 4 of the Constitution of the State of Nevada and the laws of the State of Nevada; this Defendant is a public institution of higher education, financed by the State of Nevada.

7. The Defendant UNLV has been engaged in fielding a major basketball team, within (and without) the membership of the NCAA; UNLV is, and has been, a member of NCAA.

8. The current President of UNLV and the current members of the Board of Regents, named as defendants in this action, appear *pro forma,* and are deemed to be represented by counsel for UNLV, and to have interests and contentions identical to those of UNLV.

9. Defendant NCAA is a "voluntary" association of some 1,000 institutions of higher education which "consent" to being bound by its constitution, by-laws and other so-called "legislation" (rules). [At the time of the acts of which Plaintiff complains, the NCAA's membership totalled approximately 850 members.]

10. At all times material to this action, the Defendant NCAA was, and is, predominant in the field of intercollegiate athletics, *e.g.,* NCAA does virtually all of the negotiating for its members with regard to television coverage, and supervises the payment to the membership of the many millions of dollars garnered from such coverage(s). In the words of the Chairman of the NCAA Committee (at the time the penalty against UNLV was imposed), "The NCAA is the only game in town."

11. NCAA "legislation" (rules) is set forth in an annual publication (hereinafter "The Manual"); references to "the Manual" will hereinafter refer to the 1976-1977 publication, unless specifically noted as being otherwise.

12. For some considerable period of time before February 26, 1976, NCAA conducted a preliminary investigation of UNLV and Tarkanian, vis-a-vis the Manual's requirements. ("Manual," in this context, refers to NCAA legislation dating back to at least as early as 1973.)

13. For the last twenty-four (24) months of this investigation, it was participated in, and supervised by, one Samuel David Berst, a then-Field Investigator for NCAA.

14. At all times material to this action, the same Samuel David Berst entertained actual bias and prejudice against the Plaintiff.

15. The same Samuel David Berst sought and obtained authority from the NCAA's Committee on Infractions to charge UNLV with violating NCAA legislation, *i.e.,* an "Official Inquiry."

16. This same Samuel David Berst inspired, authored and drafted this Official Inquiry, in whole or in part.

17. On February 26, 1976, NCAA submitted this Official Inquiry to UNLV, which required UNLV to answer numerous questions, perhaps as many as 300, on or before June 1, 1976.

18. UNLV obtained an extension of time to so respond of 120 days.

19. On June 21, 1976, NCAA submitted a "Supplemental Official Inquiry" to UNLV, with more questions; this was also inspired, authored and drafted - in whole or in part - by the same Samuel David Berst.

20. The State of Nevada provided UNLV with the services of two lawyers from the Office of the Attorney General of the State of Nevada and UNLV also obtained the services of a lawyer engaged in the private practice of law, to assist in the formulation of UNLV's response to both inquiries from NCAA.

21. Despite numerous requests - written and oral - counsel for UNLV - and private counsel for the Plaintiff - were unable to obtain from NCAA (or any other persons) any information about the practices and procedures of the Committee on Infractions, before whom UNLV and the Plaintiff would have to appear to present responses.

22. These requests for information included, *inter alia*: (1) whether the proceedings would be reported (transcribed); (2) whether the sources of the NCAA's information would be provided to UNLV before any hearing; and generally rules regarding these possibly adversarial hearings, *e.g.*, who had the burden of proof and what that burden would be.

23. The policies and procedures of the Committee on Infractions, unbeknownst to UNLV or to the Plaintiff,

were not codified, but scattered throughout the minutes of the Committee in other infraction hearings involving other schools.

24. The minutes of the Committee were drafted - in whole or in part - by NCAA employees in the Enforcement Division, including the same Samuel David Berst.

25. The stated purpose of the NCAA's inquiries was to ensure that there would be two, independent investigations of the charges against UNLV and its basketball program.

26. UNLV (and the Plaintiff) were obliged by NCAA to provide the Enforcement Division's investigators the results of their investigation, despite the fact that the NCAA would not reciprocate.

27. There were three (3) adversarial hearings before the NCAA Committee on Infractions, viz: November 14, 1976; December 13 and 14, 1976; and March 13, 1977; the NCAA "could not afford" to bring before it any of the persons whose information formed the bases of the charges.

28. The Plaintiff was neither accompanied by, nor represented by, counsel at the first hearing, having been misled as to that right by NCAA.

29. The first two hearings conducted before the Committee on Infractions consisted of a comparison of the unsworn recollections of the NCAA investigators with the UNLV - and Plaintiff - supplied affidavits of persons who had been interviewed by Samuel David Berst (and others) of the NCAA.

30. The third hearing was conducted at the request of UNLV and the Plaintiff, to look into the integrity and

truthfulness of the NCAA investigators, in view of the diametrically-opposed recollections and affidavits.

31. In the event of a dispute, such as occurred in all three hearings, the members of the NCAA Committee on Infractions invariably and automatically found the recollections of their investigators to be accurate and truthful, and found the information disputing those recollections to be inaccurate and untruthful.

32. There were no standards or guidelines for the members of the Committee to use, *e.g.*, the burden of proof was variously considered by members to be a preponderance, proof beyond a reasonable doubt, or being "absolutely sure" of the truthfulness of the allegations resulting in "Findings," *i.e.*, findings that UNLV was guilty of the infractions claimed by NCAA investigators.

33. At least one member of the five-member Committee on Infractions had made up his mind against UNLV before any hearings took place.

34. On April 26, 1977, the NCAA Committee on Infractions issued its "Confidential Report," enumerating its numerous findings of UNLV infractions.

35. The "Confidential Report" set forth an order to UNLV to show cause why additional penalties should not be imposed on UNLV if it did not effect "complete severance of any and all relations Tarkanian may have, formally or informally, with the University's intercollegiate athletic program during the period [two (2) years] of the University's probation including, but not limited to, activities associated with administration, supervision, coaching, recruiting, athletic booster groups and public relations or fund-raising activities related to the University's athletic program."

36. On May 13, 1977 - consistent with the Manual - UNLV gave written notice of appeal of the findings and penalty of the Committee on Infractions to the NCAA Council.

37. Plaintiff and UNLV appeared before the Council for the administrative appeal; an "Expanded Confidential Report" consisting of the earlier "Confidential Report" and the University's response was presented to the Council.

38. The same Samuel David Berst inspired, authored and drafted - in whole or in part - this "Expanded Confidential Report."

39. The members of the Council (as was the case with members of the Committee) never disagreed with the "facts" given them by NCAA investigators, but sometimes disagreed to the extent that these "facts" did not amount to a violation of NCAA legislation.

40. After UNLV, the Plaintiff and their respective counsel had left the Council hearing, the Council invited the NCAA investigators to again appear, all without notice to UNLV or to the Plaintiff, to help "clarify" certain issues.

41. On August 25, 1977, NCAA notified UNLV of the Council's acceptance of the Committee on Infraction's numerous findings and its penalty.

42. On August 26, 1977, the NCAA issued a press release which included a summary of those findings and the penalty imposed.

43. On August 30, 1977, UNLV gave notice to Plaintiff of an administrative hearing to be held by UNLV to inquire into the necessity of complying with the NCAA - imposed penalty.

44. On September 6, 1977, this hearing was had before a hearing officer who believed that UNLV had three (3) choices, viz: (1) withdrawing from the NCAA or (2) severing Tarkanian from UNLV as dictated by the NCAA; contesting the NCAA's findings did not appear to be a viable third alternative to this hearing officer.

45. On September 7, 1977, Defendant UNLV gave written notice to the Plaintiff that UNLV was going to comply with the NCAA-dictated penalty, and further, that the severance would become effective on September 9, 1977.

46. Although the Court could *sua sponte* take judicial notice of the fact that the Plaintiff was represented by counsel at the second and third hearings before the Committee on Infractions, before the NCAA Council, before the trial court which initially heard the litigation between the Plaintiff and UNLV, and who represented the Plaintiff before the Supreme Court of the State of Nevada, and before this Court in the instant action, the sole mentions of attorneys' fees are in paragraph XXVI and in the prayer for relief in the "SECOND AMENDED AND SUPPLEMENTAL COMPLAINT;" further, not a single question was asked of any witness as to the extent or cost of attorney representation.

47. "THE SECOND AMENDED AND SUPPLEMENTAL COMPLAINT" seeks redress for the threatened deprivation of "property and liberty without procedural or substantive due process. . . ."

48. The Plaintiff did not seek redress against the Defendants, or any of them, on a theory of a wilful tort, *e.g.*, defamation or interference with the Plaintiff's contractual rights, except obliquely; no proof of damages, except as herein noted, was offered.

CONCLUSIONS OF LAW

1. The actions of the NCAA were (and are) "state action," for constitutional and jurisdictional purposes. *Justice v. NCAA*, 577 F.Supp. 356 (D. Ariz. 1983), *Associated Students, Inc. v. NCAA*, 493 F.2d 1251 (9th Cir. 1974).

2. Defendant NCAA's reliance on *Blum v. Yaretsky*, 102 S.Ct. 2777 (1982) is misplaced. Defendant UNLV is a public institution, and is State-funded.

3. Defendant UNLV's reliance on *Adams v. A.Q.H.A.*, 583 S.W. 2d 828 (Tex. Civ. App. 1979) is misplaced. Defendant NCAA did not, and has not, "heeded the bounds of reason, common sense and fairness and do not violate public policy or the law." Further, membership in the NCAA could hardly be called "voluntary." (See Paragraph 9, *supra.*)

4. Both the Defendant NCAA and the Defendant UNLV have deprived the Plaintiff Tarkanian of procedural due process, *i.e.*, the opportunity to be heard at a meaningful time and in a meaningful manner. *Mathews v. Eldridge*, 96 S.Ct. 893 (1976).

5. Both the Defendant NCAA and the Defendant UNLV have deprived the Plaintiff Tarkanian of substantive due process, *i.e.*, the guarantee that he will not be deprived of liberty or property for arbitrary reasons. *Allen v. State of Nev., Pub. Emp. Ret. Bd.*, 100 Nev. Adv. Op., No. 20 (1984); the decision by NCAA was arbitrary and capricious, and the decision of UNLV was vicariously so. *Jeffries v. Turkey Run Consolidated School District*, 492 F.2d 1 (7th Cir. 1974).

6. Immediate and irreparable harm that would come to the Plaintiff includes not only damage to his reputa-

tion, but also from a loss of income which is his due, and not a mere unilateral expectation of that income. *Paul v. Davis*. 96 S.Ct. 1155 (1976).

7. The immediate and irreparable harm with which the Plaintiff is threatened by the currently-enjoined acts of the Defendant NCAA and Defendant UNLV is the loss of both liberty and property interests which must be safeguarded. *Board of Regents of State Colleges v. Roth*, 92 S.Ct. 2701 (1972).

8. Membership in the NCAA bears a likeness to prohibited "adhesion contracts," *i.e.*, the three (3) factors of (1) substantive unfairness; (2) the relationship of NCAA and UNLV; and (3) the disparity of their respective bargaining powers seem to be present. *Bill Stremmel Motors v. IDS Leasing Corp.*, 89 Nev. 414, 514 P.2d 654 (1973); Annot. 86 A.L.R.3d 862, Annot. 18 A.L.R.3d 1305.

9. Plaintiff Tarkanian has no adequate remedy at law, inasmuch as the stigma attached to Plaintiff's name would be ineradicable.

10. Balancing the interests of Tarkanian, UNLV and the NCAA, one need look no further than the great span of time which has elapsed between the final decision of the NCAA (and the capitulation of UNLV) and the time that this trial commenced (and ended), without a single complaint about the delay from either the NCAA or UNLV.

11. Attorneys' fees must be not only alleged, as in this case, but proved as well; therefore, no attorneys' fees may be awarded.

OPINION

This case presents a classic example of how misperception becomes suspicion, which in turn becomes hostility, which leads, inevitably, to a deprivation of one's rights. The Court speaks, of course, about how the view of Las Vegas, Nevada from Shawnee Mission, Kansas seems to have affected the earlier (and current) proceedings in this long-standing dispute.

The National Collegiate Athletic Association (NCAA) has evolved from the small, loose-knit association of schools envisioned by President Theodore Roosevelt in 1906 to a large bureaucracy with not only a permanent staff, but it also exercises a pervasive force throughout its 1,000-member association. In short, NCAA now seems to say: "If you want to play ball, you must join us, obey our rules and surrender *any* claim you may have under the Bill of Rights." This Court disagrees with that attitude, as any fair-minded person must.

University of Nevada, Las Vegas, (UNLV) carried out the real aim of the NCAA (severing Tarkanian), not out of respect for the NCAA's "Findings," but due to fear of the seemingly omnipotent Enforcement Division of NCAA. Despite the fact that the then-President of UNLV found that the "factual basis for the NCAA's charges and sanctions as they apply to Coach Tarkanian is clearly in doubt," UNLV felt that it was on the horns of a dilemma, *i.e.*, yield to the unjust actions of the NCAA or face being relegated to the position of a pariah in that association or to withdraw from the NCAA altogether.

The Official Procedure Governing the NCAA Enforcement Program (the Manual, at p. 116) provides, in pertinent part:

> Individuals employed by or associated with member institutions for the administration, the conduct or the coaching of intercollegiate athletics are, in the final analysis, teachers of young people. Their responsibility is an affirmative one and they must do more than avoid improper conduct or questionable acts. Their own moral values must be so certain and positive that those younger and more pliable will be influenced by a fine example. Much more is expected of them than of the less critically placed citizen.

It would seem that these fine sentiments should also apply to the "critically placed" investigators - and others - of the NCAA. Regrettably, both the full-time investigators and part-time Committee and Council members acted and thought not like Caesar's wife, but rather as arrogant lords of the manor. The language, apparently subscribed to by all of these NCAA personnel, to illustrate this arrogance, may be found in the Manual at page 118, the last sentence of Section 5 (urged on this Court by one of NCAA's many lawyers):

> Determinations of fact and violations arrived at in the foregoing manner by the Committee, or by the Council on appeal, shall be final, binding and conclusive, and shall not be subject to further review by the Council *or any other authority.* (Emphasis supplied.)

The members of the Committee on Infractions and the Council relied on the "integrity" of the permanent NCAA staff (including NCAA's investigators) and never accorded representatives of its members the common courtesy (and legal necessity) of providing a neutral

forum in which disputes regarding allegations of violations of NCAA "legislation" (rules) could be resolved. Even the NCAA's insistence on the use of the word "legislation," instead of, *e.g.*, "rules," gives us a glimpse of NCAA's view of itself and of its power.

At least one of NCAA's investigators (or employee of the Enforcement Division) inspired, authored and drafted - in whole or in part - the NCAA preliminary investigation; the authority to issue an inquiry to UNLV; the Official Inquiry; the minutes of the Committee on Infractions wherein the Committee's rules (*now* codified in the 1984-1985 Manual) appeared; the Confidential Report of that Committee; the Findings and penalty imposed by that Committee; the Expanded Confidential Report (with the Enforcement Division's comments) used by the Council on appeal; and the order of the Council and the widely-promulgated press release about the supposed violations of NCAA "legislation." These personnel also matched their unsworn and unwritten recollections against the sworn, written statements, of the same persons, offered by both Tarkanian and UNLV. These NCAA practices might be considered "efficient," but so was Adolf Eichmann and so is the Ayatollah.

A case in point will serve to illustrate the prejudice a Member (in this case, UNLV, of course) faces when challenged by the NCAA staff: NCAA investigators alleged (and "found") that Coach Tarkanian had, in violation of NCAA legislation, paid the air fare of one "Jeep" Kelly from his home to Las Vegas, Nevada. (Kelly was a player being recruited by Tarkanian.) Despite the facts that UNLV produced an affidavit from Kelly's high school coach, stating that *he* had paid for the ticket; UNLV and

Tarkanian produced a copy of the ticket; and the high school coach's cancelled check which showed the payment, the NCAA found Tarkanian "guilty" of this alleged infraction.

Not only were Tarkanian and UNLV set off on wild-goose chases because of NCAA's refusal to let them know what the rules of the hearings would be, but when Tarkanian or a representative of UNLV would telephone NCAA for some guidance, those telephone calls would be secretly taped, as that was NCAA "policy." Not only is such interception a felony in Nevada, and at least a Class A misdemeanor in Kansas, it also illustrates the duplicity of the permanent staff of NCAA. After all, just in 1984, a person in a position of trust in the Reagan Administration was found to be "unethical" for such practice, even though it may not have been illegal.

Three (3) members of the five-person Committee on Infractions testified, revealing, *inter alia*, the three (3) versions of the burden of proof set out in Finding of Fact No. 32, and the Chairman of the NCAA Council also testified and revealed, for the first time, that the fifteen (15)-member Council had delegated its determination to a committee of three (3) of its number. Neither Tarkanian nor UNLV was aware of this before Professor J. Neils Thompson testified. (Professor Thompson is a Professor of Civil Engineering at the University of Texas [since 1942]; he was also the chairman of the Council.)

The three Committee on Infractions' members who testified were: HARRY M. CROSS, a Professor of Law at the University of Washington (since 1943); WILLIAM A. MATTHEWS, Professor of Law at the University of Kentucky; ARTHUR R. REYNOLDS, a "Compliance Officer" with the GREELEY (Colo.) NATIONAL BANK (and the then-chairman of the Committee).

Some mention must be made about the treatment the judicial system has received from the NCAA:

ITEM: At the same time that the NCAA was hiding behind the conditional immunity afforded "voluntary" associations, the NCAA appeared as "amicus curiae" ("friend of the Court") in the lawsuit between Tarkanian and UNLV, before the Nevada Supreme Court.

ITEM: Notwithstanding the fact that the myriad number of NCAA lawyers were given notice that they had to abide by the practices and procedures of this Court and were on notice as to what those written, published practices and procedures are, they sought to get a continuance of the trial in a manner violative of those rules.

ITEM: Notwithstanding the fact that the NCAA expressed a desire, through counsel, to "amicably" resolve the dispute, counsel called as witnesses some persons whose testimony counsel himself doubted.

ITEM: The NCAA, incredibly, sought to equate "time" with "due process." The reasoning of the NCAA was, apparently, that since the Committee's and the Council's presentations and deliberations were time-consuming, Tarkanian and UNLV were afforded due process.

ITEM: Notwithstanding the fact that this Court admonished the NCAA for issuing daily press releases during the two-week trial, the NCAA chose to make a further release *after* it had been admonished not to try its case in the media.

In sum, what started out as an association whose members met and exceeded certain lofty goals, ended up as

the NCAA-bureaucracy which looks upon its friends (sycophants) with feigned pleasure, and its enemies (those who still recognize the U.S. Constitution) with barely-concealed malevolence. The NCAA has numerous, very distinguished individuals on its various committees and its Council for public consumption, but the real power is in the hands of bureaucrats who are unknown to, and unelected by, the membership of the NCAA.

The NCAA is an association which exists for the purpose of seeing that there is fair play; it also has the obligation to play fairly.

ORDER AND JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the University of Nevada, Las Vegas, its President, Dr. Leonard Goodall and the members of the Board of Regents, Frankie Sue Del Papa, Lilly Fong, Dorothy Gallagher, Chris Karamanos, Joan Kenney, Daniel J. Klaich, John McBride, Joann Sherrin and June Whitely, and any persons or entity acting in concert or participation with these named defendants is restrained and enjoined from effectuating any mandate of the National Collegiate Athletic Association, *i.e.*, the severance (complete or otherwise) of any and all relations [Plaintiff] Tarkanian may have, formally or informally, with the University's intercollegiate program . . . including, but not limited to, activities associated with the administration, supervision, coaching, recruiting, athletic booster groups, and public relations or fund-raising activities related to the University's athletic program.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant University and its President

and the members of its Board of Regents and any persons or entities, its officers agents, servants, employees and attorneys acting in concert are further restrained and enjoined from enforcing any provisions of Confidential Report No. 123 (47) [Case No. 443, University of Nevada, Las Vegas]);

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendant National Collegiate Athletic Association and any persons or entities, its officers, agents, servants, employees and attorneys acting in concert are restrained and enjoined from any further proceedings against the University of Nevada, Las Vegas, and more particularly, requiring that the University show cause why it should not carry out the mandate of the defendant, National Collegiate Athletic Association;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the National Collegiate Athletic Association and any persons or entities, its officers, agents, servants, employees and attorneys acting in concert are restrained and enjoined from compelling the University to comply with the terms of Confidential Report No. 123 (47) [Case No. 443, University of Nevada, Las Vegas]);

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the National Collegiate Athletic Association and any persons or entities, its officers, agents, servants, employees and attorneys acting in concert should take no action with regard to the University of Nevada, Las Vegas with regard to this Confidential Report;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the injunctions herein-above imposed upon the defendants, and each of them, and any persons or entities or their respective officers, agents, servants, em-

ployees and attorneys acting in concert with them, is made permanent.

DATED AND DONE THIS 25th day of June, 1984.

/s/ Paul S. Goldman
Paul S. Goldman
District Judge

DOCUMENT D

(Filed January 21, 1985)

CASE NO. A 173498
DEPT. NO. X
CIVIL DOCKET K

IN THE
EIGHTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF CLARK

JERRY TARKANIAN,
Plaintiff,

vs.

UNIVERSITY OF NEVADA, UNIVERSITY OF NEVADA, LAS VEGAS, DR. LEONARD GOODALL, as President of the University of Nevada, Las Vegas, and Officer of the University of Nevada; and FRANKIE SUE DEL PAPA, LILLY FONG, DOROTHY GALLAGHER, CHRIS KARAMANOS, JOAN KENNEY, DANIEL J. KLAICH, JOHN McBRIDE, JOANN SHERRIN and JUNE WHITELY, as Members of the Board of Regents of the University of Nevada; and the NATIONAL COLLEGIATE ATHLETIC ASSOCIATION an unincorporated association,
Defendants.

NOTICE OF ENTRY OF ORDER AND FINDINGS OF FACT AND CONCLUSIONS OF LAW

TO: Defendant NCAA, and DAVID GOLDWATER, ESQ., its Attorney; and

TO: Defendants UNIVERSITY OF NEVADA, *et al.*; and to GARY GOODHEART, ESQ., Attorney for all Defendants Except NCAA:

PLEASE TAKE NOTICE that the Court's FINDINGS OF FACT AND CONCLUSIONS OF LAW and ORDER were entered on the 21st day of January, 1985, in the above-entitled action, true and correct copies of which are attached hereto.

Lionel Sawyer & Collins
By: /s/ Mark A. Solomon
Samuel S. Lionel, Esq.
Mark A. Solomon, Esq.
1700 Valley Bank Plaza
300 South Fourth Street
Las Vegas, Nevada 89101
Attorneys for Plaintiff

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

1. Plaintiff, Jerry Tarkanian, Head Basketball Coach for the University of Nevada, Las Vegas commenced this action on September 8, 1977 against The University of Nevada, The University of Nevada, Las Vegas, the then President of University of Nevada, Las Vegas and an Officer of the University of Nevada, and members of the Board of Regents of the University of Nevada seeking to vindicate his civil rights by enjoining those defendants from carrying out the National Collegiate Athletic Association's mandate to suspend plaintiff from his coaching position at University of Nevada, Las Vegas for a period of two years.

2. The first trial of this action commenced on October 12, 1977 and culminated with plaintiff Tarkanian obtaining a permanent injunction prohibiting those defendants from suspending plaintiff from his coaching position.

3. After the Nevada Supreme Court reversed and remanded the matter for joinder of the NCAA as a party-defendant, plaintiff filed a Second Amended And Supplemental Complaint on July 23, 1979 alleging facts sufficient to state a claim for relief under 42 U.S.C. §1983. At all times since September 8, 1977 all defendants knew that plaintiff commenced this action under 42 U.S.C. §1983.

4. After numerous pretrial matters and disputes were resolved, including the NCAA's oral motion for a continuance, the second trial of this matter commenced on June 11, 1984 after the then current President of the University of Nevada, Las Vegas and Members of the Board of Regents of the University of Nevada were substituted as defendants for their respective predecessors. Hereinafter all defendants other than the NCAA shall be collectively referred to as "UNLV".

5. On June 25, 1984 the Court entered its Preliminary Statement, Findings Of Fact, Conclusions Of Law, Opinion, Order And Judgment ("Ruling") and held that the action of defendants NCAA and UNLV constituted state action and deprived plaintiff Tarkanian of his rights to procedural and substantive due process under the United States Constitution. The Court issued a permanent injunction prohibiting defendants from carrying out the NCAA's mandate to suspend plaintiff from his coaching position at UNLV.

6. In its Ruling, the Court also denied plaintiff attorney's fees as damages.

7. On June 26, 1984 plaintiff filed a Memorandum of Costs And Disbursements ("Cost Memorandum").

8. Both the affidavit of plaintiff's counsel, Mark A. Solomon of Lionel Sawyer & Collins, and the detailed attorney time records appended to plaintiff's Cost Memorandum demonstrated that through June 22, 1984 plaintiff incurred $168,364.70 in attorney's fees and $2,814.22 in costs in connection with this litigation.

9. On June 29, 1984, defendant UNLV filed a Motion To Retax And Settle Costs; and on that same date, defendant NCAA also filed a Motion To Retax And Settle Costs.

10. On July 17, 1984, the date set for hearing of defendants' motions to retax and settle costs, defendant NCAA filed a Petition For Removal to the United States District Court, District of Nevada.

11. On November 15, 1984 the United States District Court, District of Nevada remanded this case to this Court.

12. On December 4, 1984 the Court heard oral argument on defendants' motions to retax and settle costs and ordered further briefing.

13. On January 11, 1985 plaintiff filed Supplemental Points And Authorities In Opposition To Motion To Retax And Settle Costs ("Supplemental Opposition") in which he requested an additional $19,773.00 in attorney's fees for services performed from June 23, 1984 through January 10, 1985. Plaintiff attached thereto detailed attorney time records covering that period and substantiating the services performed and fees charged.

14. Also attached to plaintiff's Supplemental Opposition is an affidavit by the Legal Administrator of

Lionel Sawyer & Collins, Mary Ann Kennington, which states the results of a June, 1984 survey conducted by the then President of the Las Vegas Chapter of the Association of Legal Administrators on prevailing market rates for attorney services in Las Vegas, Nevada.

15. With the exception of a conclusionary affidavit without foundation submitted by the NCAA's counsel, David Goldwater, to the effect that the fees sought by Lionel Sawyer & Collins exceeded prevailing market rates, neither the NCAA nor UNLV presented any evidence challenging the accuracy or reasonableness of the hours and rates charged and services provided by plaintiff's counsel as detailed in the attorney time records submitted to the Court on June 26, 1984 and January 11, 1985.

16. The Court is well familiar with counsel for plaintiff, their work product and preparation during the course of this litigation, and the rates charged for similar services by attorneys and paralegals of comparable experience, reputation and skill in Las Vegas, Nevada.

17. The Court has read the entire file in this action and observed plaintiff's counsel during all pretrial, trial and post-trial matters before this Court and believes that the quality of services rendered by plaintiff's counsel met the standards of professional excellence.

18. This case presented complicated and novel issues of fact and law, particularly civil rights law, and plaintiff obtained virtually all the relief requested in his Second Amended And Supplemental Complaint.

19. Defendant NCAA initiated and controlled the proceedings which led to plaintiff Tarkanian's suspension. In suspending plaintiff from his coaching position, UNLV

was in large part responding to the mandate of the NCAA which has been intimately involved in this action from its inception.

20. If any of these findings of fact are more properly conclusions of law, they shall be so deemed.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over this matter by virtue of the United States District Court's remand of this action on November 15, 1984.

2. Plaintiff is a prevailing party under 42 U.S.C. §1983 and is entitled to an award of costs and attorney's fees pursuant to N.R.S. 18.005 et seq. and 42 U.S.C. §1988.

3. Plaintiff has presented the Court with clear and convincing evidence regarding the services performed, the rates charged and the hours worked by his counsel on this litigation.

4. The services performed, hours worked and rates charged by plaintiff's counsel as detailed in the attorney time summaries submitted to the Court on June 26, 1984 and January 11, 1985 are reasonable.

5. Pursuant to the evidence presented by plaintiff and the Court's own experience, the Court is satisfied that the rates charged by plaintiff's counsel are reasonable and in line with the rates charged in Las Vegas, Nevada, for similar services by attorneys and paralegals of comparable skill, experience and reputation.

6. Pursuant to N.R.S. 18.005 et seq. and 42 U.S.C. §1988 plaintiff Tarkanian is entitled to an award of costs including attorney's fees in the amount of $195,951.92.

7. The award of costs and attorney's fees shall be apportioned among the defendants as follows: (1) defendant NCAA shall be assessed and shall pay to plaintiff 90% of the award, and (2) defendant UNLV shall be assessed and shall pay to plaintiff 10% of the award.

8. If any of these conclusions of law are more properly findings of fact, they shall be so deemed.

DATED this 21 day of January, 1985.

/s/ Paul S. Goldman
District Judge

SUBMITTED BY:

Lionel Sawyer & Collins
By: /s/ Mark A. Solomon
Samuel S. Lionel, Esq.
Mark A. Solomon, Esq.
1700 Valley Bank Plaza
300 South Fourth Street
Las Vegas, Nevada 89101
Attorneys for Plaintiff

ORDER

This matter came before the Court for hearing pursuant to defendant National Collegiate Athletic Association's (hereinafter "NCAA") Motion To Retax And Settle Costs filed June 29, 1984 and defendants University of Nevada, et al.'s (hereinafter collectively "UNLV") Motion To Retax And Settle Costs filed June 29, 1984, Lionel Sawyer & Collins representing plaintiff Tarkanian, Jones, Jones, Bell, Close & Brown representing defendants UNLV, and David Goldwater, Ltd. and Swanson Midgley, Gangwere, Clarke & Kitchin representing defendant NCAA,

and the Court having considered all moving and opposition papers, and the Court having made its Findings Of Fact And Conclusions Of Law, hereby makes its orders as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT defendants' motions to retax and settle costs be, and the same are hereby denied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that pursuant to N.R.S. 18.005 et seq. and 42 U.S.C. §1988 plaintiff is awarded the amount of $195,951.92 as costs including attorney's fees.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the award of costs including attorney's fees shall be apportioned among defendants as follows: (1) defendant NCAA shall be assessed and shall pay to plaintiff the amount of $176,356.73, which is equal to 90% of the award; and (2) defendant UNLV shall be assessed and shall pay to plaintiff the amount of $19,595.19, which is equal to 10% of the award.

DATED this 21st day of Jan., 1985.

/s/ Paul S. Goldman
District Judge

SUBMITTED BY:
Lionel Sawyer & Collins
By: /s/ Mark A. Solomon
Samuel S. Lionel, Esq.
Mark A. Solomon, Esq.
1700 Valley Bank Plaza
300 South Fourth Street
Las Vegas, Nevada 89101
Attorneys for Plaintiff

RECEIPT OF COPY

RECEIPT OF COPY of the above NOTICE OF ENTRY OF ORDER AND FINDINGS OF FACT AND CONCLUSIONS OF LAW is hereby acknowledged this 21st day of January, 1985.

David Goldwater, Esq.
By: /s/ David Goldwater
David Goldwater, Esq.
302 E. Carson, #1000
Las Vegas, Nevada 89101
Attorneys for Defendant NCAA

DATED this 21 day of January, 1985.

Jones, Jones, Close & Brown
Chartered
By: /s/ Gary R. Goodheart
Gary R. Goodheart, Esq.
300 South Fourth Street, #700
Las Vegas, Nevada 89101
Attorneys for all Defendants
Except NCAA

DOCUMENT E

UNIVERSITY OF NEVADA, University of Nevada, Las Vegas, Donald H. Baepler, as President of the University of Nevada, Las Vegas, and an Officer of the University of Nevada, and James Buchanan, II, Dr. Fred Anderson, John Buchanan, Lilly Fong, Chris Karamanos, Molly Knudtsen, Dr. Louis Lombardi, Brenda Mason, John Tom Ross, as Members of the Board of Regents of the University of Nevada,
Appellants,

v.

Jerry TARKANIAN,
Respondent.

No. 10425.

Supreme Court of Nevada.

May 17, 1979.

OPINION

MOWBRAY, Chief Justice:

The respondent, Jerry Tarkanian, commenced this action in the district court seeking declaratory and injunctive relief from a severance order barring Tarkanian from association with the athletic program of the University of Nevada, Las Vegas (UNLV).

UNLV, its president and regents have appealed. The National Collegiate Athletic Association (NCAA), whose report of Tarkanian's activities was the predicate for UNLV's order of suspension, is not a party to this action. The NCAA has filed an amicus curiae brief with this court.

THE BACKGROUND OF THE LITIGATION

UNLV is a public institution of higher learning which is financed by the State of Nevada. It is a member of the NCAA, an unincorporated association of approximately 830 members, including virtually all four year colleges and universities in the United States with major intercollegiate athletic programs. As a member of the NCAA, UNLV contractually agrees to administer its athletic program in accordance with NCAA legislation. The NCAA Constitution provides that "Legislation governing the conduct of intercollegiate athletic programs of member institutions shall apply to basic athletic issues such as admissions, financial aid, eligibility and recruiting; member institutions shall be obligated to apply and enforce this legislation, and the enforcement program of the Association shall be applied to an institution when it fails to fulfill this obligation." Primary responsibility for administering the NCAA enforcement program has been delegated to the Committee on Infractions.

On February 26, 1976, the NCAA Committee on Infractions initiated enforcement proceedings involving UNLV by submitting an Official Inquiry to its president, respondent Dr. Baepler. The Official Inquiry was the result of a preliminary investigation conducted over a period of approximately three years by the NCAA investigative staff. The Official Inquiry included, *inter alia*, allegations that Tarkanian had violated NCAA legislation. Upon receipt of the letter of inquiry, UNLV enlisted the aid of the Attorney General of the State of Nevada to conduct a "cooperative investigation".

Hearings before the Committee on Infractions were conducted on November 14, 1976; December 13, and 14, 1976; and March 13, 1977. The record contains the follow-

ing description of the nature of these proceedings by an NCAA official:

> Once the institution has collected all available information, it then meets with the Committee on Infractions to discuss the information which it has obtained and previously submitted to the Committee in writing. The purpose of this hearing before the Committee on Infractions is for both the institution and the NCAA investigative staff, for the first time, to present specific information to the Committee concerning alleged violations of NCAA legislation. This procedure provides an adequate opportunity for the institutional representatives to debate any of the information presented to the Committee by the investigative staff or the institution, and to be advised of the source of the information upon which each allegation is based. Both the Committee on Infractions and the University will be informed at the hearing of the identity of the source of evidence upon which an allegation is based as well as any actual details or evidence reported by individuals interviewed.

The requests of UNLV for prior disclosure of the factual bases or sources of the allegations contained in the letter of inquiry had been denied. Shortly before the first hearing was scheduled, the NCAA notified the university that it had changed its prior position and would allow counsel representing university employees named in the allegations to be present. Tarkanian was present at all of the hearings and was represented by counsel at the second and third. According to the record herein, "the charges and allegations against Jerry Tarkanian were presented by the sole means of having either of two NCAA

staff investigators . . . orally relate what each of them recalled of conversations he purportedly had with certain individuals concerning their knowledge of purported violations of NCAA legislation by Jerry Tarkanian." The sources of the information reported to the investigators were not present to give testimony or be cross-examined. A tape recording of the proceedings was made by the NCAA, but no other reporting was allowed, and the tape was not made available for later transcription by the NCAA, although university attorneys were allowed to travel to Kansas City to listen to it.

On April 26, 1977, the Committee on Infractions issued Confidential Report No. 123(47) containing the Committee's findings of violations of NCAA legislation and recommending penalties to be imposed on UNLV for such violations. Among the Committee's findings was a charge that Tarkanian had either contacted or arranged for others to contact principals involved in the infractions investigation in an effort to discourage them from reporting violations to the NCAA or to cause them to give untruthful information to the university's investigators. Included in the penalty section was an order directing UNLV to show cause why additional penalties should not be imposed if it did not take disciplinary action with regard to "Head Basketball Coach Jerry Tarkanian which, in the Committee's present view, should be complete severance of any and all relations Tarkanian may have, formally or informally, with the University's intercollegiate athletic program during the period of the University's probation including, but not limited to, activities associated with administration, supervision, coaching, recruiting, athletic booster groups and public relations or fundraising activities related to the University's athletic program."

The university's attention was drawn to the "responsibilities of the institution" under NCAA legislation "to provide due notice and hearing to the involved individual before taking any disciplinary or corrective action."

UNLV appealed the findings and penalty provisions of the report to the NCAA Council. In its written memorandum the university contested the factual bases for twenty-seven of the Committee's findings, including some twenty which directly or indirectly involved Tarkanian, contending that evidence obtained in its own investigation demonstrated that no violations had occurred. The university was critical of the procedures employed by the NCAA, and attacked the credibility of the two NCAA investigators who had presented information to the Committee on Infractions. Tarkanian and the university were allowed twenty and thirty minutes, respectively, for oral presentation of information to the Council. On August 25, 1977, the NCAA Council accepted the findings and recommended penalty of the Committee on Infractions.

On September 6, 1977, pursuant to notice, Tarkanian was given a hearing before a hearing officer appointed by the university. Tarkanian was advised that the charges were as specified in the NCAA Confidential Report, that he could have assistance of counsel, that he could call witnesses in his behalf, and that he could have a transcript of the hearing made. Though the evidence before the NCAA was discussed, no witnesses were presented. Counsel for Tarkanian took the position that the university's own evidence established that no violations had occurred, while counsel for the university argued that the university was bound by the findings of the NCAA. In a written decision, the hearing officer concluded that counsel for the university was correct in his argument that "by joining the NCAA we delegated to that organization the establishment of governing standards and their enforcement as well. We are allowed and encouraged to make our own investigations, but this is in no way a substitute for the investigative functions of the NCAA itself. . . . We must accept their findings of fact as in some way superior to our own." He also found that "in this instance the NCAA's standards of proof and due process were inferior to what we might reasonably expect. . . ." He recommended executing the proposed NCAA sanctions. Dr. Baepler notified Tarkanian the following day that he had decided to follow the hearing officer's recommendation, effective September 9, 1977, noting "the University is simply left without alternatives."

THE PRESENT LITIGATION

On September 8, 1977, Tarkanian filed suit against UNLV, President Baepler, and the university's regents, seeking an injunction restraining enforcement of the NCAA sanction by the university, and a declaration that he had been denied procedural and substantive due process of law. A major portion of the complaint was directed to the procedures, findings and penalty of the NCAA. By its answer, the university put Tarkanian's allegation concerning the NCAA's activities and procedures at issue. The university also alleged, as an affirmative defense, that it was "a mere extension of the NCAA and, therefore, plaintiff has been afforded not only the due process hearing provided by the University of Nevada, Las Vegas, but also prior hearings conducted by the NCAA, all in compliance with the traditional notions of due process of law."

Prior to trial, an extensive "Stipulation of Facts" was filed by the parties. Some 30 of the 37 stipulations

concerned the structure and procedures of the NCAA in general, or its actions in this case in particular. Accompanying the stipulated facts were ten exhibits, including correspondence between the university's investigator and the NCAA staff regarding problems encountered by the university related to NCAA procedures.

At trial, Tarkanian and two other witnesses testified as to the effect of a suspension upon Tarkanian's reputation and career. Tarkanian also called the two attorney-investigators for the university, who detailed their problems with NCAA staff and procedure. The only witness questioned as to the evidence for the underlying charges against Tarkanian was the deputy attorney general who had acted for the university during its investigation; he testified that he had found no factual basis for the charges. No witnesses were presented for the defense.

AN ACTUAL CONTROVERSY IS PRESENTED

As a threshold issue, amicus curiae suggests that the case should be dismissed as not presenting an actual controversy. As this court has recognized, " 'The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.' " *State v. Teeter*, 65 Nev. 584, 654, 200 P.2d 657, 691 (1948). The principle requires that a court "act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the action of some third party not before the court." *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42, 96 S.Ct. 1917, 1926, 48 L.Ed.2d 450 (1976).

Accord, National Collegiate Athletic Ass'n v. Califano, 444 F.Supp. 425 (D.Kan.1978). In *State v. McCullough*, 20 Nev. 154, 156, 18 P. 756 (1888), the court observed that "Courts uniformly refuse to consider cases brought upon pretended controversies, when the object of the suit is to get the opinion of the court for the benefit of the parties themselves, or to affect the interest of third persons."

In the instant case, it is clear that the purpose of the university's suspension of Tarkanian was to carry out the mandate of the NCAA, and not merely to create a cause of action for litigation. There is no evidence whatever to suggest that had the university prevailed it would then have reinstated Tarkanian, in defiance of what it had determined were its contractual obligations to the NCAA and in the face of prospective sanctions by the NCAA.

This case does present an actual controversy, and therefore shall not be dismissed.

THE JOINDER OF THE NCAA AS A NECESSARY PARTY

Rule 19 of the Nevada Rules of Civil Procedure provides for the joinder of persons needed for just adjudication. It provides:

> (a) A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action *shall be joined* as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to pro-

tect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. *If he has not been so joined, the court shall order that he be made a party.* If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff.

(Emphasis added.)

This provision of the rules of civil procedure reflects certain long-standing policies prevailing in equitable actions, such as the one now before the court, as described in *Robinson v. Kind*, 23 Nev. 330, 47 P. 1, 47 P. 977 (1896). In such cases, all persons with an interest in the subject matter of the suit are to be made parties " 'so that there may be a complete decree which shall bind them all.' " 23 Nev. at 335, 47 P. at 2. If the interest of the absent parties " 'may be affected or bound by the decree, they must be brought before the court, or it will not proceed to a decree.' " *Id.* If a defendant before the court may be subjected to future litigation, or danger of loss, under the decree, the absent person must be made a party. *Id.* at 335-36, 47 P. 1.

As is shown by the mandatory language of Rule 19(a), the enforcement of the rule is not left to the parties themselves. As was said of the prior statute dealing with equitable actions,

> "If there are other persons, not parties, whose rights must be ascertained and settled before the rights of the parties to the suit can be determined, then the statute is peremptory. The court must cause such persons to be brought in. It is not a matter of discretion, but of absolute judicial duty. The enforcement of this duty does not rest entirely upon the the parties to the record. If they should neglect to raise the question and to apply for the proper order, the court, upon its own motion, will supply the omission, and will either directly bring in the new parties, or remand the cause in order that the plaintiff may bring them in."

Robinson v. Kind, 23 Nev. at 338, 47 P. at 3-4. Thus the question of waiver is not appropriate to the determination of this issue, and the trial court or the appellate court may raise the issue *sua sponte*. *Johnson v. Johnson*, 93 Nev. 655, 572 P.2d 925 (1977). This is sound policy, for the rule thus protects the interest of the courts themselves in the efficacy and integrity of their own proceedings, as well as the interests of the parties.

In the case at hand, it is clear from the pleadings, the evidence presented at trial, and the judgment, that the NCAA should have been joined in this action. First, the interest of the NCAA in the subject matter of this litigation was such that either the university would be affected, or the NCAA's ability to protect its interests would be impaired, and in either case further litigation of the controversy would be likely, should it proceed without joinder of the NCAA.

As the situation now stands, regardless of the outcome of this litigation, the NCAA may claim a contractual right to bind the university to enforce the NCAA's decision by sanctions it deems appropriate. This is illustrated in the factual background of *Regents of University of Minnesota v. National Collegiate Athletic Association*, 560 F.2d 352 (8th Cir.), *cert. dismissed* 434 U.S. 978, 98

S.Ct. 600, 54 L.Ed.2d 472 (1977), in which the university sought injunctive relief against NCAA sanctions. In that case, the university had been enjoined by a state court from declaring certain students ineligible, pursuant to an NCAA determination, without a prior university hearing comporting with due process. As a result of such hearings, the university refused to suspend the students. The NCAA then placed the university on indefinite suspension, including a ban on post-season play or television appearances for all sports, until the university complied with its directive to declare the students ineligible. The NCAA took the position that it could not "permit an individual institution to retain either interpretive or enforcement authority" over NCAA legislation. *Id.* at 360.[1]

Respondent argues that the court need not be concerned with the university's position on this account, since the university will be insulated by the terms of the lower court's decree from compliance with the NCAA decision. If the university would be so protected, the NCAA would, to that extent, be unable to protect its interests in its enforcement proceedings. *See Ky. H. S. Athl. Ass'n v. Hopkins Cty. Bd. of Ed.*, 552 S.W.2d 685 (Ky.App.1977).

An independent ground for requiring joinder in this case is provided by the directive of Rule 19(a) that a person be joined when "complete relief" cannot be accorded the parties before the court in his absence. A major objective of this provision is "to have a final and

1. The NCAA's right to impose those sanctions upon the university was upheld by the Court of Appeals, on the ground that the court order, and due process, were complied with when the university hearings were held, affording procedural due process, and determining that the underlying facts found by the NCAA were essentially correct.

complete determination of the controversy, not to determine issues piecemeal . . . ." *Investment Co. v. Reno Club,* 66 Nev. 216, 222, 208 P.2d 297, 300 (1949). In this case, the controversy presented involves the NCAA directly, and cannot be completely and justly determined in its absence. The NCAA initiated and controlled the proceedings against UNLV which led to Tarkanian's suspension. The NCAA made the factual findings upon which Tarkanian's suspension was based. To consider the case as if it involved solely the relationship of the university and Tarkanian, or began with the university's notification to Tarkanian of its intent to hold a hearing regarding his proposed suspension, would require the plaintiff to forego constitutional claims to which he may well be entitled.

Plaintiff's fundamental claim in this case is that he was denied his constitutional right to due process of law. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' *Armstrong v. Manzo,* 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965)." *Mathews v. Eldridge,* 424 U.S. 319, 333, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1976). It is clear that the meaningful factual determinations in this case, as well as the decision as to the penalty to be imposed, had been made by the NCAA *before* Tarkanian was afforded a hearing by UNLV. A court of equity, in particular, should not be foreclosed from recognizing this reality, and affording plaintiff the relief to which it may entitle him.

As was observed by the Supreme Court of Oklahoma of a similar attempt by the NCAA to insulate from judicial scrutiny actions it had taken which affected, through a member university, certain coaching employees:

> Courts are normally reluctant to interfere with the internal affairs of voluntary membership associations, however, in particular situations, where the considerations of [public] policy and justice are sufficiently compelling judicial scrutiny and relief are available. In dealing with an organization in which membership is an economic necessity, the courts must be particularly alert to the need for protecting the public welfare and advancing the interests of justice by reasonably safeguarding the individual's opportunity to earn a livelihood while not impairing the proper standards and objectives of the organization. The necessity of court action is apparent when the position of a voluntary association is so dominant in its field that membership in a practical sense is not voluntary but economically necessary.

Bd. of Regents v. Nat. Collegiate Ath. Ass'n, 561 P.2d 499, 504 (Okla.1977) (footnotes omitted).

It is therefore clear that the instant case falls squarely within the mandate of NRCP 19(a). We note that the briefs of the parties have cited a number of cases from the federal jurisdictions discussing Fed.R.Civ.Proc. 19(b), which addresses the situation in which a party *cannot* be joined. In such a situation, considerable weight is given the positions taken during litigation by the parties themselves, and to the fact that reversal will require dismissal of the entire action. *See esp., Provident Bank v. Patterson,* 390 U.S. 102, 88 S.Ct. 738, 19 L.Ed.2d 936 (1968). In this case, however, there is no contention that the NCAA is not amenable to service of process or that its joinder would affect the jurisdiction of the court

below.[2] In such circumstances, consideration of the issues raised by NRCP 19(b) is not warranted. *See Robinson v. Kind, supra,* 23 Nev. 330, 47 P. 977 (petition for rehearing).

Tarkanian, UNLV and the NCAA, each for its own reasons, preferred the trial to proceed without the joinder of the NCAA. This course did not serve the interest of justice or comply with the requirement of NRCP 19(a). Remand of the action will, in this case, serve the interest of judicial efficiency by precluding subsequent litigation of the very issues now presented.

We therefore reverse and remand for joinder of the NCAA and further proceedings.

THOMPSON, MANOUKIAN and BATJER, JJ., concur.

GUNDERSON, Justice, concurring.

As my colleagues hold, the NCAA is a necessary party to this litigation. Therefore, I agree it was improper for the district court to act in these premises, without requiring the NCAA's joinder. In the absence of such a joinder, however, I also believe there would be no bona fide, justiciable controversy.

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2. To the contrary, see Corresp. File, affidavit of M. Soloman, 5/8/78; and Amicus Curiae Opposition to Motion to Strike Brief, 5/16/78.

DOCUMENT F

(Filed October 12, 1977)

CASE NO. A 173498
DEPT. NO. II

IN THE
EIGHTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF CLARK

JERRY TARKANIAN,
Plaintiff,

vs.

UNIVERSITY OF NEVADA, et al,
Defendants.

JUDGMENT

This matter having come on regularly for a trial before the Court upon the Complaint of Jerry Tarkanian, Samuel S. Lionel, Esq. and Mark A. Solomon, Esq. of Lionel Sawyer & Collins appearing on behalf of the plaintiff, and Thomas G. Bell, Esq. and Roy E. Smith, Esq. of Jones, Jones, Bell, Close & Brown appearing on behalf of the defendants; and the Court having heard the testimony examined the proof offered, and having considered arguments on behalf of the plaintiff and defendants, and the cause having been submitted to the Court for a decision on September 26, 1977, and the Court being fully advised in the premises and having rendered a decision in the cause, and based upon the Findings of Fact and Conclusions of Law made herewith, it is hereby

ORDERED, ADJUDGED AND DECREED that defendants have arbitrarily and capriciously deprived plaintiff of his property and liberty without procedural or substantive due process of law and have further chilled and otherwise infringed upon plaintiff's freedom of association all in violation of the Fourteenth Amendment to the Constitution of the United States of America; and it is further

ORDERED, ADJUDGED AND DECREED that defendants, and their respective agents, officers, servants and employees, and each of them, and all persons in active concert or participation with them shall be, and are hereby permanently enjoined and restrained from imposing a severance of any relations plaintiff may have formally or informally, with UNLV's intercollegiate athletic program, including, but not limited to, activities associated with administration, supervising, coaching, recruiting, athletic booster groups and public relations or fund-raising activities related to UNLV's athletic program, or any other action or proceeding against plaintiff on the basis of any findings or matters contained in the National Collegiate Athletic Association Confidential Report No. 123(47) [Case No. 443, UNLV]; and it is further

ORDERED, ADJUDGED AND DECREED that plaintiff shall recover of defendants as damages, attorneys' fees and costs, and the Court shall retain jurisdiction to make other and further orders with respect thereto should the parties fail to agree as to the respective amounts thereof; and it is further.

ORDERED, ADJUDGED AND DECREED that the Clerk of the above-entitled Court shall forthwith deliver to plaintiff's attorneys the $100.00 cash bond which was

posted pursuant to the Temporary Restraining Order entered and filed herein on September 8, 1977.

DATED this 12th day of October, 1977.

/s/ James Brennan
District Judge

Submitted by:

Lionel Sawyer & Collins
By /s/ Samuel S. Lionel
Samuel S. Lionel, Esq.
Attorneys for Plaintiff
300 South Fourth St. #1700
Las Vegas, Nevada 89101

DOCUMENT G

(Filed August 6, 1979)

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA,
LAS VEGAS

Civ-LV-79-170, RDF

JERRY TARKANIAN,
Plaintiff,

vs.

UNIVERSITY OF NEVADA, et al.,
Petitioners.

JOINT PETITION FOR REMOVAL

Come now all the defendants to the above-entitled cause, by and through their respective Counsel, and jointly file this "Petition For Removal" of the said above-entitled cause from the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, to the United States District Court for the District of Nevada, Las Vegas. Petitioner, The National Collegiate Athletic Association (NCAA) is appearing for purposes of removal, and for no other purpose. In support of this Petition, Petitioners state to the Court as follows:

1. On or about September 8, 1977, plaintiff filed an action in the Eighth Judicial Circuit Court of Nevada in and for Clark County seeking declaratory and injunctive relief. Named as defendants were the UNIVERSITY

OF NEVADA, UNIVERSITY OF NEVADA, LAS VEGAS, DONALD H. BAEPLER, President, and nine members of the Board of Regents of the UNIVERSITY OF NEVADA. A true copy of Plaintiff's said original Complaint is attached hereto as Exhibit A. Said cause was assigned Case No. A173498.

2. The said District Court, after a hearing, thereafter entered a permanent injunction in favor of plaintiff and against the defendants in that cause, a true copy of which is attached hereto as Exhibit B.

3. The named defendants duly appealed and the Supreme Court of Nevada, on May 17, 1979, reversed the judgment of the District Court of Nevada, under the requirement of NRCP 19 (a) and stated:

> "In the case at hand, it is clear from the pleadings, the evidence presented at trial, and the judgment, that the NCAA should have been joined in this action."

A true copy of the Supreme Court's opinion is attached hereto as Exhibit C.

4. Thereafter, on July 12, 1979, an "Amended and Supplemental Complaint" was filed in the Eighth Judicial District Court of Nevada in and for the County of Clark, under Case No. A174398, naming as defendant for the first time the National Collegiate Athletic Association (NCAA). Additionally, other new persons were named as defendants in their capacity as president of University of Nevada, Las Vegas, and new Trustees. Summons and process were duly issued by the Clerk of the District Court of Clark County, Nevada and purportedly served on the NCAA along with the Order of

the District Court dated July 11, 1979, by serving the NCAA in Johnson County, Kansas on July 18, 1979. True and complete copy of said papers are attached hereto as Exhibit D.

5. On July 23, 1979, the plaintiff delivered his "Second Amended and Supplemental Complaint" to the attorney for all defendants except the NCAA, which now inserts the name of the NCAA among the defendants in Paragraph I and the prayer for relief. A true copy of said Second Amended & Supplemental Complaint is attached hereto as Exhibit E.

6. Copies of all other process, pleadings and orders served upon the original defendants are hereby attached as Exhibit F.

7. Plaintiff's Second Amended and Supplemental Complaint (as well as his Amended Complaint) charges that the Petitioners have violated his Constitutional rights to due process under the Fourteenth Amendment to the Constitution of the United States (Paragraphs I, XXVII and prayer for relief of the Complaint). Plaintiff further alleges in Paragraph VII of the said Complaint that the NCAA and state-supported universities are sufficiently intertwined so that the activities of the Petitioner NCAA "constitute state action". Therefore this is a civil action of which this Court has original jurisdiction under the provisions of Title 28, United States Code, Sections 1343 (3) and (4) and is one that can be removed by defendants pursuant to the provisions of Title 28, United States Code, Section 1441, in that it is a civil action seeking to redress alleged deprivations, under color of state law, statutes, ordinances, regulations, customs or usages, of rights, privileges or immunities secured by the Constitution of the United States.

8. Said Amended and Supplemental Complaint, by adding the NCAA as a new party defendant, so changed the nature and substance of the matter as to constitute a new suit for purposes of removal, as the Supreme Court of Nevada in its judgment reversing the original judgment decreed that plaintiff was not entitled to any relief in his first suit unless and until he sued the defendant NCAA.

9. The NCAA is an unincorporated association consisting of approximately 860 members (including the University of Nevada, Las Vegas) located throughout all the states. Plaintiff's Amended Complaint is an attack on the policies, procedures and guidelines employed by the NCAA's Committee on Infractions, claiming that such are "wholly inconsistent with the mandates of minimal due process of law" (Complaint, Par. XV). As such, he seeks to have the Court determine that the NCAA's procedures, adopted by and governing the approximately 860 member colleges and universities throughout the United States, are unconstitutional and invalid.

10. The Amended Complaint now puts directly in issue plaintiff's claims that he has been denied due process by virtue of the Association's procedures, and, for the first time in the litigation he has directly confronted the new defendant, the NCAA, with such claims. As such, the Amended Complaint substantially changes the nature and substance of his claim.

11. All defendants now join in this petition to remove.

12. Petitioners file and present herewith a bond as required by law with good and sufficient surety conditioned that the Petitioners will pay all of the costs and

disbursements by reason of the removal proceedings hereby brought should it be determined that this action is not removable or is improperly removed.

WHEREFORE, Petitioners, UNIVERSITY OF NEVADA, UNIVERSITY OF NEVADA, LAS VEGAS, DR. LEONARD GOODALL, LILLY FONG, JAMES BUCHANAN II, ROBERT CASHELL, CHRIS KARAMANOS, MOLLY KNUDTSEN, DR. LEWIS LOMBARDI, JOHN McBRIDE, BRENDA MASON, JOHN TOM ROSS and THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION respectfully pray that the above action now pending against them in the Eighth Judicial District Court of the State of Nevada in and for the County of Clark be removed to this Court.

The National Collegiate Athletic Association
By /s/ George H. Gangwere
Its Agent and Attorney
Swanson, Midgley, Gangwere, Thurlo & Clarke
1500 Commerce Bank Building
Kansas City, Missouri 64106
(816) 842-9692
and
Weiner, Goldwater & Waldman, Ltd.
Suite 703 First National Bank Building
320 East Carson Avenue
Las Vegas, Nevada 89101
(702) 382-9666

University of Nevada, University of Nevada, Las Vegas, Dr. Leonard Goodall, Lilly Fong, James Buchanan II, Robert Cashell, Chris Karamanos, Molly Knudtsen, Dr. Lewis Lombardi, John McBride, Brenda Mason and John Tom Ross
By /s/ Roy E. Smith
Their Agent and Attorney
Jones, Jones, Bell, Close & Brown, Ltd.
Suite 700 Valley Bank Plaza
300 South Fourth Street
Las Vegas, Nevada 89101
(702) 385-4202

STATE OF MISSOURI)
) ss.
COUNTY OF JACKSON)

GEORGE H. GANGWERE, of lawful age, being first duly sworn upon his oath, states that he is the Agent and Attorney of Record for The National Collegiate Athletic Association, a voluntary unincorporated association, one of the Petitioners herein; that he makes this affidavit for it and on its behalf and by its authority; that he has read the foregoing Joint Petition For Removal and that all of the statements, allegations, averments and exhibits which are respectively contained therein or attached thereto are true and correct to the best of his knowledge, information and belief.

/s/ George H. Gangwere

Subscribed and sworn to before me this 31st day of July, 1979.

/s/ Irene Andrist
Notary Public

My commission expires: April 9, 1981.

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

ROY E. SMITH, of lawful age, being first duly sworn upon his oath, states that he is the Agent and Attorney of record for UNIVERSITY OF NEVADA, UNIVERSITY OF NEVADA, LAS VEGAS, DR. LEONARD GOODALL, LILLY FONG, JAMES BUCHANAN II, ROBERT CASHELL, CHRIS KARAMANOS, MOLLY KNUDTSEN, DR. LEWIS LOMBARDI, JOHN McBRIDE, BRENDA MASON and JOHN TOM ROSS, Petitioners herein; that he makes this affidavit for them and on their behalf and by their authority; that he has read the foregoing Joint Petition For Removal and that all of the statements, allegations, averments and exhibits which are respectively contained therein or attached thereto are true and correct to the best of his knowledge, information and belief.

/s/ Roy E. Smith

Subscribed and sworn to before me this 2nd day of August, 1979.

/s/ Elaine McBride
(Seal) Notary Public

My commission expires: April 28, 1982.

DOCUMENT H

(Filed February 19, 1980)

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Civil LV 79-170 RDF

JERRY TARKANIAN,
Plaintiff,

vs.

UNIVERSITY OF NEVADA; UNIVERSITY OF NEVADA, LAS VEGAS; DR. LEONARD GOODALL, as President of the University of Nevada, Las Vegas, and an Officer of the University of Nevada; and LILLY FONG, JAMES BUCHANAN II, ROBERT CASHELL, CHRIS KARAMANOS, MOLLY KNUDTSEN, DR. LEWIS LOMBARDI, JOHN McBRIDE, BRENDA MASON, and JOHN TOM ROSS, as Members of the Board of Regents of the University of Nevada; and the NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, an unincorporated association,
Defendants.

ORDER GRANTING MOTION TO REMAND

On September 8, 1977, Jerry Tarkanian, the head basketball coach at the University of Nevada, Las Vegas (UNLV), a branch or a division of the University of Nevada system, filed suit in the Eighth Judicial District Court of the State of Nevada seeking declaratory and injunctive relief against alleged violations of his right

to due process and freedom of association. The suit arose out of the attempt by UNLV to remove Tarkanian from his position at the school and to sever all ties between him and the institution's intercollegiate athletic program as a result of an investigation and recommendation of the National Collegiate Athletic Association (NCAA). The defendants in the suit in addition to UNLV were the University of Nevada, the president of UNLV, and members of the Board of Regents of the University of Nevada. The original defendants will be referred to hereinafter as "the Nevada defendants." The Nevada court, after a hearing, entered a permanent injunction in favor of Tarkanian. On appeal to the Nevada Supreme Court, the district court judgment was reversed and remanded on the ground that Rule 19(a) of the Nevada Rules of Civil Procedure required the joinder of the NCAA. *University of Nevada v. Tarkanian*, 95 Nev. ....., 594 P.2d 1159 (1979).

The NCAA is an unincorporated, voluntary association whose members include approximately 860 colleges and universities, including UNLV, in all fifty states. Its headquarters are in Shawnee Mission, Kansas. The NCAA adopts regulations governing the conduct of intercollegiate athletic programs by the member institutions. The NCAA also conducts investigations, through its committee on infractions, as to compliance of member institutions. Upon a finding of a violation, the NCAA may impose a variety of sanctions.

On July 18, 1979, the NCAA was served in Kansas with an amended complaint that named the association as a defendant. A second amended complaint, adding the NCAA to the allegations of paragraph I, was served on counsel for all defendants except the NCAA, on July 23,

1979. On August 6, 1979, all the defendants filed a Joint Petition for Removal of the action to this court pursuant to Title 28, § 1441 et seq., of the United States Code. The petition alleges that the addition of the NCAA substantially altered the nature of the claim asserted.

The NCAA has moved to be dismissed as a defendant on the ground that, as an unincorporated association, it is not amenable to being sued in its own name under the laws of Nevada. The plaintiff has moved to remand the case to the state court on the ground that removal was improper because the case was not removed within thirty days from the time the pleadings were served on the first defendant.

A. The Motion to Remand

This action seeking redress of alleged deprivations of plaintiff's right to due process and freedom of association is clearly such as is normally removable under Title 28, U.S.C., § 1441(b). Moreover, it has been so since its original filing. It was and is a civil action of which the District Courts of the United States "have original jurisdiction founded on a claim or right arising under the Constitution of the United States." Such original jurisdiction is conferred by 28 U.S.C. § 1343(3). In such federal question cases, diversity is not a prerequisite to removal.

This Court is faced, however, with a challenge to the propriety of the removal procedure. The legal basis for the plaintiff's motion to remand the action to the state court is well articulated in a recent decision from the Southern District of Texas:

> "It is a general rule that all defendants, except purely nominal parties, who have been served and

who may properly join in a removal petition, must so join in order to effect removal. 28 U.S.C. § 1441 (a); 1A Moore's Federal Practice (Moore's) paragraph 0.168[3.-5] pp. 447-448; Perrin v. Walker, 385 F.Supp. 945 (E.D.Ill. 1974); Tri Cities Newspapers Inc. v. Tri Cities Printing Pressmen and Assistants Local 349, 427 F.2d 325 (5th Cir. 1970). In other words, unanimity among all defendants substantively entitled to remove is required for removal. Section 1446(b) states that a petition for removal shall be filed within thirty days 'after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading . . .' 28 U.S.C. § 1446(b). Since unanimity of all defendants is required for removal, the rule has evolved that if the first defendant served does not file a petition for removal within thirty days of service, he waives his right to remove. Thus subsequently served defendants who attempt to remove within thirty days of their service may not remove since they could not include the first defendant in their petition for removal. 1A Moore's paragraph 0.168[3.-2] p. 451, n. 18, paragraph 0.168[3.-5] p. 478; Transport Indemnity Co. v. Financial Trust Co., 339 F.Supp. 405 (C.D.Cal. 1972); Crocker v. A. B. Chance Co., 270 F.Supp. 618 (S.D.Fla. 1967); Fugard v Thierry, 265 F.Supp. 743 (N.D.Ill. 1967); Hutchins v. Priddy, 103 F.Supp. 601 (W.D.Mo. 1952). Failure of a defendant to seek removal within the thirty day time limitation may not be cured retroactively by consenting to and joining a subsequently served defendant's petition for removal. Transport Indemnity Co. v. Financial Trust Co., supra; Perrin v. Walker, supra; Manis v. North American Rockwell

Corp., 329 F.Supp. 1077 (C.D.Cal. 1971); Maybruck v. Haim, 290 F.Supp. 721 (S.D.N.Y. 1968). Although the thirty day time limitation is not jurisdictional, it is a formal rule of procedure, Adams v. Western Steel Building, Inc., 296 F.Supp. 759 (D.Colo. 1969), which is strictly applied. Perrin v. Walker, supra; Vendetti v. Schuster, 242 F.Supp. 746 (W.D.Pa. 1965).

"Pursuant to 28 U.S.C. § 1447(c) a case removed 'improvidently' shall be remanded to the state court. A removal is improvident if there is not compliance with the thirty day filing requirement. London v. United States Fire Ins. Co., 531 F.2d 257 (5th Cir. 1976); In Re Merrimack Mutual Fire Ins. Co., 587 F.2d 642 (5th Cir. 1978)."

Friedrich v. Whittaker Corp., 467 F.Supp. 1012, 1013-14 (S.D.Tex. 1979).

There are two situations in which the thirty-day time period for removal may be "revived" at some point beyond the filing or service of what is strictly the "initial pleading" of a given action. The first is statutorily based. Section 1446(b) of Title 28 provides that if an action was not removable at the filing of the initial pleading but becomes so by some change in the circumstances of the case, the thirty-day period commences to run from the point of such change. This statutory provision is clearly inapplicable here, the action having been removable at the outset. The other exception is apparently judicially created. Courts have held that the right to removal may be revived if there has been a very substantial alteration in the nature of the action. The NCAA contends that such a change occurred with its addition as a defendant by amendment of the complaint.

The rationale behind the principle of reviving the right to remove upon substantial alteration is explained in the following quotation which also sets forth the test to be applied in determining whether the principle should be invoked:

> "If the action could have been removed initially but was not, an amendment of the claim does not generally revive the right of removal. See City of Waterbury v. H. L. Yoh Co., 253 F.Supp. 778 (D.Conn. 1966); Lacy v. Mid-Continent Cas. Co., 247 F.Supp. 667, 670 (S.D.Tex. 1965); 1A J. Moore, Federal Practice 1242-43 (1965).
>
> "However, these principles must be tempered with the recognition that '[w]illingness to remain in the state court for one cause of action does not show a willingness, or constitute a waiver, as to some quite different cause.' Garden Homes, Inc. v. Mason, 143 F.Supp. 144, 145 (D.Mass. 1956), citing Henderson v. Midwest Ref. Co., 43 F.2d 23 (10th Cir. 1930). Though the right of removal may have been present and waived in the first instance, a sufficiently substantial change in the nature of the action may re-afford the opportunity. See Henderson v. Midwest Ref. Co., supra; Fugard v. Thierry, 265 F.Supp. 743, 745 (N.D. Ill. 1967); City of Waterbury v. H. L. Yoh Co., supra; Garden Homes, Inc., v. Mason, supra; Baron v. Brown, 83 F.Supp. 520 (S.D.N.Y. 1949). *The question is whether the alteration has 'so changed the character of the litigation as to make it substantially a new suit begun that day.'* Fletcher v. Hamlet, 116 U.S. 408, 410, 6 S.Ct. 426, 427, 29 L.Ed. 679 (1886)."

Adams v. Western Steel Buildings, Inc., 296 F.Supp. 759, 761-62 (D. Colo. 1969) (emphasis added).

The defendant relies on several turn-of-the-century cases that stand for the proposition that the addition of a defendant "revives" the right of removal. The modern cases, however, unanimously hold to the contrary position. The modern view is based on the requirement of unanimity among defendants in seeking removal. When original defendants fail to seek removal, they are deemed to have waived the right and are thus precluded from joining a subsequent petition and thereby defeat it. See, e.g., *Fugard v. Thierry*, 265 F.Supp. 743, 745 (N.D. Ill. 1967).

The NCAA notes that as originally filed, this action challenged only the procedures invoked by UNLV and the other defendants in connection with the attempted removal of the plaintiff from his position as head basketball coach. The amended complaint on the other hand, argues the NCAA, challenges for the first time the NCAA's rules and regulations. It is readily apparent that the addition of the NCAA did add significant new elements which were not part of the suit as originally filed. But these modifications affect only the NCAA. The claims against the Nevada defendants remain unchanged. That was precisely the situation in *Fugard v. Thierry*, supra. There the original complaint alleged breach of contract against a single defendant. An amendment added other defendants charging them with inducement of the breach. Since the complaint remained unchanged with respect to the original defendant, the District Court in Northern Illinois ruled that that defendant could not join the new defendants' petition for removal and therefore removal was precluded.

Appiying the same principles to the case before this Court, it appears that the action was improvidently re-

moved from state court and must be remanded. The Nevada defendants, against whom the claims remain identical to those originally filed, have waived their right to seek removal. Therefore, the petition of the NCAA must fail for lack of joinder of all defendants in the petition to remove.

The NCAA has also argued that it would be unjust to deny removal in this instance where the interests of colleges and universities from around the country are at stake for the first time. While this argument does have a certain emotional appeal, particularly in a situation in which the true adversity of the original parties might reasonably be questioned,[1] the requirement of unanimity among the defendants and the concept of waiver by failure to assert the right to remove at the earlier available time are too well entrenched. The right to remove is a statutory privilege that is strictly construed. See 1A *Moore's Federal Practice*, paragraph 0.157[1.-3]. Moreover, if the NCAA had been made an original defendant, the Nevada defendants could have defeated removal from the outset by refusing to join the removal petition no matter how important the interests of the nonresident defendant or the members it represents, and no matter how strongly the nonresident may wish to avoid potential prejudice of the Nevada courts. When Judge Arraj spoke of determining whether "it would be manifestly unjust to deny a new chance at removal in view of substantial changes in the nature and substance of the claims asserted," *Adams v. Western Steel Buildings, Inc.*, supra, 296 F.Supp. at 762, he was not setting out a new test for revival of the right

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1. See University of Nevada v. Tarkanian, 95 Nev. ....., 594 P.2d 1159, 1165 (Gunderson, J., concurring) (noting that absent the joinder of NCAA he was of the opinion that there would be no justiciable controversy).

to remove. Rather, he was still working within the context of a change that is so substantial as to essentially constitute a new action. With respect to the Nevada defendants here, there has been no such drastic change. Therefore, they are precluded from joining the NCAA's petition to remove which in turn defeats the removal effort. This action, having been improvidently removed to federal court, must be remanded to the state court.

B. Motion to Dismiss

There is authority for the position that, if there exist grounds for dismissal, the Court should so rule before deciding, if necessary, the question of remand. See *Block v. Block*, 196 F.2d 930, 933 (7th Cir. 1952); *Friedrich v. Whittaker Corp.*, 467 F.Supp. 1012, 1014 (S.D. Tex. 1979); *Amins v. Life Support Medical Equipment Corp.*, 373 F. Supp. 654, 656 (E.D.N.Y. 1974); *Pliler v. Asiatic Petroleum Co. (Texas), Ltd.*, 197 F.Supp. 212 (S.D. Tex. 1961); 1A *Moore's Federal Practice*, paragraph 0.169[1], pp. 559-60. See also *State of Washington v. American League of Professional Baseball Clubs*, 460 F.2d 654, 658-59 (9th Cir. 1972) (recognizing the rule that if the state court lacked jurisdiction, federal court must dismiss). If this Court adopted that position, it would be necessary to rule on the defendant NCAA's motion to dismiss before considering the motion to remand the case to the Nevada court.

Unfortunately, the cases cited above do not expostulate a rationale for preferring dismissal to remand, nor is the reason readily apparent in most cases. Cf. *State of Washington v. American League of Professional Baseball Clubs*, supra; *Friedrich v. Whittaker Corp.*, supra (where the objection to state court jurisdiction is based on the existence of exclusive federal jurisdiction of the action, the inappropriateness of remand is obvious). It may be that in most cases a dismissal will dispense with any further proceedings in the case, particularly if there is a single claim against a single defendant. In such situations, remand will simply delay the inevitable result. Ironically, perhaps, the only exposition of a rationale for the rule appears in a decision which adopts the position that a court has disretion to dispose of the action on whichever ground (dismissal or remand) is most convenient or appropriate in the circumstances. Affirming a district court's disposition of an action with respect to one of two defendants on a motion to dismiss, the Fifth Circuit said:

> "Since this case was, under the terms of the removal statute, unquestionably in the district court even though later subject to a proper motion for remand, if a suit could properly be pending anywhere, once it became apparent by the filing of the motion to quash service of process that there was a question raised by the defendant below whether it could properly be brought into court in Mississippi under any circumstances, it was proper for the trial court to examine into this question immediately and not subject the defendant, so protesting, to a further hearing on the motion to remand and possibly to a further hearing in a state court where it would then have to raise once again the question of personal jurisdiction. Once appellee lodged in the district court its challenge to the jurisdiction in personam, it was entirely appropriate for that court to inquire into, and resolve, that issue." *Walker v. Savell*, 335 F.2d 536, 539 (5th Cir.1964).

Nevertheless, it is clear that the Fifth Circuit did not wish to foreclose the possibility that in another situation

a district court might not properly choose remand over consideration of a motion to dismiss. The Court quoted approvingly from *Garden Homes v. Mason*, 238 F.2d 651, 654 (1st Cir. 1956), wherein the First Circuit indicated that the question of which method of disposition should be used might be within the discretion of the Court. 335 F.2d at 539. The First circuit avoided a definitive holding on that issue in *Garden Homes* by pointing out that there the removal had been clearly proper. Indeed, one district court recently did remand without considering the motion to dismiss. In *Limbach Co. v. Renaissance Center Partnership*, 457 F.Supp. 347, 349 (W.D. Pa. 1978), Judge Zeigler wrote:

> "In the case at bar, it would be inappropriate and possibly unjust to Limbach to adjudge defendant's motion to dismiss before remanding and we decline to do so. As our earlier analysis revealed, this court lacks diversity jurisdiction. Accordingly, if we determined the existence of personal jurisdiction over defendant, we would still be required to remand to state court. Moreover, questions of personal jurisdiction raise complex issues relating to defendant's contacts with Pennsylvania. The parties would be entitled to extensive discovery. Time would be expended before the court could resolve the issue, thereby further delaying the action.
>
> "We do not question defendant's motives in removing this case to this court. It should be noted, however, the question of personal jurisdiction could have been raised in state court following the filing of the complaint. Once the case is remanded to state court, the defendant can, of course, seek dismissal at that time; therefore, the court foresees little, if any,

> prejudice resulting from our decision to remand rather than deciding defendant's motion to dismiss."

This Court believes that in the present action there are several reasons which favor the remand without consideration of the NCAA's motion to dismiss. First, this is not a case in which the state court's lack of jurisdiction, if such is the case, is obvious. Cf. *Block v. Block*, supra (no service of process). Second, and perhaps most important, the merits of the NCAA's motion to dismiss turns upon an interpretation of Nevada law. The federal courts are hesitant to undertake such an endeavor whenever it may be avoided. Unlike several cases enunciating the preference for disposition on a motion to dismiss, this is not a case where the question turns upon the application of established, or at least well-charted, state law to the specific facts of a new case. Cf. *Walker v. Savell*, supra (Mississippi's long-arm statute); *Amins v. Life Support Medical Equipment Corp.*, supra (New York's); *Pliler v. Asiatic Petroleum Co. (Texas), Ltd.*, supra (Texas'). Rather, this motion asks this Court to pass on an issue upon which the Nevada court has yet to definitively speak, namely, the extent to which NRS § 12.110 did away with the common law rule that an unincorporated association could not be sued in its own name. The two cases relied on by the NCAA in support of its motion, *Owens v. International Association of Heat and Frost Insulators and Asbestos Workers*, 213 F.Supp. 927 (D. Nev. 1963), and *Hanley v. Sheet Metal Workers International Association*, 72 Nev. 52, 293 P.2d 544 (1956), both dealt only with the sufficiency of process upon unincorporated associations, and not the more fundamental issue of amenability to suit. Indeed, in *Owens*, this Court expressly declined to rule on that question, 213 F.Supp. at 929. Finally, even if this

Court were to grant the NCAA's motion to dismiss, the controversy would not be resolved. It would then be incumbent upon this Court to determine whether, in light of the Nevada Supreme Court's holding that the NCAA was a party to be joined under Rule 19(a), Nev. R. Civ. P., the action could be maintained in the NCAA's absence as a named defendant. This would be still one more question of state law which might be avoided by remand.

Therefore, in light of the foregoing, this Court is of the opinion that its discretion should be exercised to remand the case to the Nevada court without deciding the merits of the NCAA's motion to dismiss.

DATED: February 19th, 1980.

/s/ Roger D. Foley
District Judge

DOCUMENT I

(Filed July 17, 1984)

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA,
LAS VEGAS

Case No. CV-LV 460 RDF

JERRY TARKANIAN,
Plaintiff,

vs.

UNIVERSITY OF NEVADA, et al.,
Defendants.

PETITION FOR REMOVAL

Comes now defendant The National Collegiate Athletic Association by and through its counsel and files this "Petition For Removal" of the said above-entitled cause from the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, to the United States District Court for the District of Nevada, Las Vegas. In support of this Petition, Petitioner states to the Court as follows:

1. On or about September 8, 1977, plaintiff filed an action in the Eighth Judicial Circuit Court of Nevada in and for Clark County seeking declaratory and injunctive relief. Named as defendants were the UNIVERSITY OF NEVADA, UNIVERSITY OF NEVADA, LAS VEGAS, DONALD H. BAEPLER, President, and nine members of the Board of Regents of the UNIVERSITY OF NEVADA.

A true copy of Plaintiff's said original Complaint is attached hereto as Exhibit A. Said cause was assigned Case No. A173498.

2. The said District Court, after a hearing, thereafter entered a permanent injunction in favor of plaintiff and against the defendants in that cause, a true copy of which is attached hereto as Exhibit B.

3. The named defendants duly appealed and the Supreme Court of Nevada, on May 17, 1979, reversed the judgment of the District Court of Nevada, under the requirement of NRCP 19 (a) and stated:

> "In the case at hand, it is clear from the pleadings, the evidence presented at trial, and the judgment, that the NCAA should have been joined in this action."

A true copy of the Supreme Court's opinion is attached hereto as Exhibit C.

4. Thereafter, on July 12, 1979, an "Amended and Supplemental Complaint, was filed in the Eighth Judicial District Court of Nevada in and for the County of Clark, under Case No. A174398, naming as defendant for the first time the National Collegiate Athletic Association (NCAA). Additionally, other new persons were named as defendants in their capacity as president of University of Nevada, Las Vegas, and new Trustees. Summons and process were duly issued by the Clerk of the District Court of Clark County, Nevada and purportedly served on the NCAA along with the Order of the District Court dated July 11, 1979, by serving the NCAA in Johnson County, Kansas on July 18, 1979. True and complete copies of said papers are attached hereto as Exhibit D.

5. On July 23, 1979, the plaintiff delivered his "Second Amended and Supplemental Complaint" to the attorney for all defendants except the NCAA, which added the name of the NCAA among the defendants in Paragraph I and the prayer for relief. A true copy of said Second Amended & Supplemental Complaint is attached hereto as Exhibit E.

6. On August 6, 1979, all of the defendants filed in the United States District Court For the District Of Nevada, Las Vegas, their Joint Petition For Removal and a Bond on Removal. Written notice of such filing was given the same date to plaintiff's counsel and the Clerk of the Eighth Judicial District Court of the State of Nevada in and for the County of Clark, true copies of such pleadings are attached. On August 13, 1979, plaintiff filed his Motion To Remand and his Points and Authorities in the federal court. On August 17, 1979, plaintiff filed with the federal court a copy of the Affidavit of Samuel S. Lionel certified to by the Clerk of the Supreme Court of Nevada. On August 28, 1979, the NCAA filed in the federal court its Request For Oral Arguments and its Points And Authorities In Opposition To Plaintiff's Motion to Remand. On September 10, 1979, plaintiff filed in the federal court his Reply To The National Collegiate Athletic Association's Points and Authorities In Opposition To Plaintiff's Motion To Remand. On February 19, 1980, U. S. District Judge Roger D. Foley entered his Order Granting Motion To Remand. True copies of the foregoing and other pleadings and orders filed in the U. S. District Court are attached hereto as Exhibits F-N.

7. After remand of the cause to the Eighth Judicial District Court Of The State of Nevada, UNLV and the NCAA filed their separate Answers to Plaintiff's Second Amended And Supplement Complaint, true copies of which are attached hereto as Exhibits O and P.

At the time of trial counsel for UNLV substituted as defendants the names of the current President and members of the Board of Regents of the University of Nevada for those named as defendants in the original complaint.

8. Trial in the Nevada court on plaintiff's Second Amended And Supplemental Complaint commenced on June 11, and ended on June 22, 1984. After the conclusion of trial and on June 22, 1984, plaintiff, the NCAA and UNLV filed with the Clerk of the Eighth Judicial District Court Of The State of Nevada and delivered to counsel for the other parties their trial briefs. Plaintiff served a Memorandum on Attorneys Fees on all parties in open court at the conclusion of the trial on June 22, 1984. True copies of the memorandum and trial briefs are attached hereto as Exhibits Q-T.

9. On June 25, 1984, Judge Paul S. Goldman, District Judge for the Eighth Judicial District Court Of The State Of Nevada, entered his Preliminary Statement, Findings Of Fact, Conclusions Of Law, Opinion, Order And Judgment. A true copy of such judgment is attached hereto as Exhibit U.

10. On or about June 26, 1984, plaintiff filed his Memorandum of Costs wherein he itemized and claimed entitlement to as court costs, *inter alia,* $168,364.70 as and for his attorney's fees. UNLV and the NCAA each filed their separate Motions to Retax and Settle Costs and on July 9, 1984, plaintiff filed and delivered to counsel for UNLV and the NCAA his Points and Authorities In Opposition to NCAA's Motion To Retax and Settle Costs and his Points and Authorities in opposition to UNLV's motion. True copies of these pleadings are attached hereto as Exhibits V-Z.

11. In its judgment entered June 25, 1984, the state court concluded that "the actions of the NCAA were (and are) 'state actions,' for constitutional and jurisdictional purposes" that both the NCAA and UNLV deprived plaintiff of procedural and substantive due process; that the decision of the NCAA that plaintiff should be suspended from his head coaching duties for two years was arbitrary and capricious and UNLV's decision to the same effect was "vicariously" arbitrary and capricious and that "no attorney's fee's may be awarded" because no proof on such fees was offered. The state court then enjoined UNLV and the NCAA from proceeding in any manner to carry out the NCAA's direction to UNLV to show cause why plaintiff should not be suspended from his head coaching position for a two-year period.

12. Copies of other process, pleadings and orders served upon the original defendants are hereby attached as Exhibit AA.

13. Plaintiff's Second Amended and Supplemental Complaint (as well as his Amended Complaint) charges that the Petitioners violated his Constitutional rights to due process under the Fourteenth Amendment to the Constitution of the United States (Paragraphs I, XXVII and prayer for relief of the Complaint). Plaintiff further alleges in Paragraph VII of the said Complaint that the NCAA and state-supported universities are sufficiently intertwined so that the activities of the Petitioner NCAA "constitute state action". The Second Amended and Supplemental Complaint challenged for the first time the NCAA rules and regulations and its conduct in the NCAA administrative-type hearings involving plaintiff and UNLV. Like plaintiff's challenge of UNLV's hearing made in the initial complaint, the challenge of the NCAA's conduct

at the hearings was under the due process clause of the Fourteenth Amendment of the U. S. Constitution. When the NCAA, joined by UNLV, attempted to remove the case to federal court in 1979, the U. S. District Court, Judge Roger D. Foley, ruled that although plaintiff for the first time had attacked the NCAA rules and regulations, the "modifications [made by plaintiff in amending his Complaint and adding the NCAA as a party-defendant] affect only the NCAA" and "[t]he claims against the Nevada defendants remain unchanged." (Exhibit N, p. 6). Therefore, it was on the sole basis that the plaintiff's claim against UNLV remained the same that Judge Foley ordered the cause remanded to the Nevada state court.

14. No further pleading, order or other paper in any way describing the nature of plaintiff's claim or the issues raised by his Complaint was filed with the Nevada court or received by the defendant until after completion of a trial in the Nevada court on June 22, 1984, when plaintiff filed his trial brief. On July 9, 1984, plaintiff filed his Points and Authorities wherein he urged the Nevada court to award him attorney's fees of $168,114.70 under USC § 1988 even though the court in its decision had ruled that attorney's fees could not be awarded under Nevada law.

15. Plaintiff first made his claim to entitlement of attorney's fees under § 1988 of the federal Civil Rights Act after the state court had conducted the trial and ruled that attorney's fees could not be awarded to plaintiff under Nevada law. Plaintiff's claim for an award of attorney's fees under § 1988 raises a new issue and is a sufficiently substantial change in the nature of the claim against, and the relief sought from, the NCAA,

that it affords a new opportunity to remove this action to the United States District Court.

16. The NCAA is the only real defendant in the action. During the trial, only the NCAA demonstrated an interest in defending against the plaintiff's claims. The Nevada court's written findings, conclusions and decision entered on June 25, 1984, recognizes UNLV's non-defendant status in this litigation. Although counsel for both plaintiff and UNLV carefully structured their respective pre-trial pleadings and conduct in a manner designed to give the appearance that UNLV was a legitimate defendant, the evidence offered by plaintiff and UNLV at trial and their pleadings and arguments post-trial clearly show that UNLV is at best a nominal defendant which properly should be realigned, for purposes of removal, as a party-plaintiff. For example, on several occasions during the course of trial, counsel for UNLV failed to register valid objections that it had as to the admissibility of evidence offered by plaintiff and supportive of plaintiff's allegations against defendants. In particular, counsel for UNLV stood mute while two attorneys who acted as legal counsel for UNLV in the NCAA proceedings testified for plaintiff as to matters within the scope of the attorney-client privilege. Further, those attorneys testified that, in their opinion as lawyers, there was no credible evidence to support the NCAA's findings that plaintiff had violated NCAA rules and that the NCAA Committee which made the finding acted in an arbitrary and capricious manner. As an additional example, at the conclusion of trial, counsel for plaintiff in arguing for an award of attorney's fees urged without solicitation from the Court that such an award should be assessed mostly or entirely against the NCAA.

The written transcript of the trial in state court (which is being prepared) will demonstrate that the only evidence offered to show that UNLV personally denied plaintiff procedural or substantive due process related to a hearing granted to plaintiff by UNLV in September, 1977. According to such evidence, the NCAA had directed UNLV to show cause to the NCAA why plaintiff should not be suspended from his head coaching position for a period of two years. This direction was based on the NCAA's determination that plaintiff had participated in certain violations of NCAA rules and regulations relating to the admission, eligibility and financial aid of basketball players at UNLV and in the NCAA's investigation of possible violations of NCAA rules. Plaintiff successfully urged to the Nevada court that after UNLV granted plaintiff a hearing on the NCAA show cause directive, UNLV reluctantly agreed to, and in fact did, suspend plaintiff from his head coaching position. The UNLV employee who conducted the UNLV hearing testified for plaintiff and stated that although plaintiff presented no evidence and no witnesses appeared, he gratuitously found that whether plaintiff was afforded due process in the NCAA proceedings was clearly in doubt. Plaintiff and UNLV each offered evidence that in arriving at the finding that plaintiff should be suspended, the NCAA, and only the NCAA, had deprived plaintiff of both procedural and substantive due process and that UNLV carried out the NCAA directive solely because of what the Nevada court characterized as an adhesion contract.

Under date of July 9, 1984, the new President, University of Nevada, Las Vegas, communicated to the NCAA his intention to not permit an appeal by UNLV of the Nevada court's decision and judgment. On July 16, 1984,

counsel for the NCAA requested that UNLV join in a petition for removal of this litigation to the U. S. District Court. UNLV through its counsel has declined to join in such a petition.

17. Defendant NCAA files and presents herewith a bond as required by law with good and sufficient surety conditioned that it will pay all of the costs and disbursements by reason of the removal proceedings hereby brought should it be determined that this action is not removable or is improperly removed.

WHEREFORE, Petitioner, The National Collegiate Athletic Association respectfully prays that the above action now pending against it in the Eighth Judicial District Court of the State of Nevada in and for the County of Clark be removed to this Court.

David Goldwater, Ltd.
By /s/ David Goldwater
David Goldwater
Suite 1000
First National Bank Building
302 East Carson Avenue
Las Vegas, Nevada 89101

Swanson, Midgley, Gangwere,
Clarke & Kitchin
By: James H. McLarney
1500 Commerce Trust Building
Kansas City, Missouri 64106

Attorneys for the National
Collegiate Athletic Association

STATE OF Nevada)
)
COUNTY OF Clark)

James H. McLarney, of lawful age, being first duly sworn upon his oath, states that he is the Agent and Attorney of Record for THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, a voluntary unincorporated association, one of the Petitioners herein; that he makes this affidavit for it and on its behalf and by its authority; that he has read the foregoing Petition For Removal and that all of the statements, allegations, averments and exhibits which are respectively contained therein or attached thereto are true and correct to the best of his knowledge, information and belief.

/s/ James H. McLarney

Subscribed and sworn to before me this 17th day of July, 1984.

/s/ Irene M. Flatt
Notary Public

(Seal)

My commission expires: June 16, 1987.

DOCUMENT J

(Filed November 15, 1984)

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Civil LV 84-460 RDF

JERRY TARKANIAN,
Plaintiff,

vs.

UNIVERSITY OF NEVADA, et al., and NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, an unincorporated association,
Defendants.

ORDER FOR REMAND

On July 17, 1984, the defendant National Collegiate Athletic Association (NCAA) petitioned to remove this case from the state court after trial and judgment had been entered in that court.

On August 9, 1984, plaintiff, joined by the University of Nevada, Las Vegas (UNLV), moved to strike NCAA's petition for removal or, alternatively, to remand the case to the state court.

On August 28, 1984, this court gave NCAA until October 31, 1984, to augment the record herein and stayed consideration of the motion to strike or remand until after October 31, 1984.

This court, in this same case, granted a motion to remand the matter to the state court on February 19, 1979. See Civil LV 79-170 RDF, order granting motion to remand.

Having carefully considered the matter again,

IT IS ORDERED that NCAA's pending petition for removal made after trial and judgment in the state court, is stricken. The case is again remanded to the state court.

DATED: November 15, 1984.

/s/ Roger D. Foley
District Judge

DOCUMENT K

(Filed March 25, 1985)

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

CV-LV-84-460-RDF

JERRY TARKANIAN,
Plaintiff/Appellee,

vs.

UNIVERSITY OF NEVADA, et al,
Defendants,

and

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Defendant/Appellant.

ORDER ON MANDATE

The above-entitled cause having been before the United States Court of Appeals for the Ninth Circuit, and the Court of Appeals having on March 5, 1985 issued its mandate remanding the District Court Judgment, and the Court being fully advised in the premises, NOW, THEREFORE, IT IS ORDERED that the mandate be spread upon the records of this Court.

IT IS FURTHER ORDERED .....

Dated this 25 day of MARCH, 1985.

/s/ Roger D. Foley
Roger D. Foley
United States District Judge

DOCUMENT L

(Filed November 30, 1984)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-7825

THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION
Petitioner,

vs.

HONORABLE ROGER D. FOLEY; JERRY TARKANIAN; UNIVERSITY OF NEVADA; UNIVERSITY OF NEVADA-LAS VEGAS; DR. LEONARD GOODALL, as President of the University of Nevada-Las Vegas, and Officer of the University of Nevada; and FRANKIE SUE DEL PAPA, LILLY FONG, DOROTHY GALLAGHER, CHRIS KARAMANOS, JOAN KENNEY, DANIEL J. KLAICH, JOHN McBRIDE, JOANN SHERRIN and JUNE WHITELY, as Members of the Board of Regents of the University of Nevada,
Respondents.

PETITION FOR WRIT OF MANDAMUS

COMES NOW petitioner, The National Collegiate Athletic Association, and pursuant to Rule 21 of the Federal Rules of Appellate Procedure, petitions this Court for a Writ of Mandamus directed to the Honorable Roger D. Foley, Judge of the United States District Court for the District of Nevada, Las Vegas directing him to set aside his Order for Remand signed on November 15, 1984, and served upon petitioner on November 21, 1984.

INTRODUCTION

A writ of mandamus is the proper remedy to bring Judge Foley's Order for Remand before this Court for review. The Order for Remand should be set aside because Judge Foley exceeded the scope of his authority set forth in 28 U.S.C. §1447(c) in entering the order. Petitioner's Petition for Removal was proper and should be entertained by the federal district court in that respondent Tarkanian's request for attorney fees pursuant to 42 U.S.C. §1988 is a new, separate and independent cause of action. The petition is timely, having been filed within 30 days of service on petitioner of respondent Tarkanian's demand for attorney's fees pursuant to 42 U.S.C. §1988. It is not necessary for respondents University of Nevada-Las Vegas and the Board of Regents of the University of Nevada to join in the Petition for Removal, as their true interests lie with respondent Tarkanian, thereby justifying their realignment with him, at least for purposes of removal.

STATEMENT OF FACTS

Respondent Tarkanian instituted an action in the Eighth Judicial District Court of Nevada on September 8, 1977 seeking relief against the Board of Regents of the University of Nevada and the University of Nevada-Las Vegas for alleged violations of the Fourteenth Amendment to the United States Constitution. (EXHIBIT "A") Petitioner was not made a party to the action at that time. Following a hearing before Judge James Brennan, judgment was entered enjoining the University from disciplining respondent Tarkanian by temporarily suspending him from his head coaching duties at the University of Nevada-Las Vegas. (EXHIBIT "B") The University, upon

the urging of petitioner but with great reluctance, appealed the decision to the Supreme Court of Nevada. The Supreme Court reversed, citing respondent Tarkanian's failure to join a necessary and indispensable party, i.e. petitioner NCAA. (EXHIBIT "C") The omission was corrected when respondent Tarkanian filed his Amended and Supplemental Complaint on July 12, 1979 (EXHIBIT "D"), and again on or about July 23, 1979 when he filed his Second Amended and Supplemental Complaint, naming petitioner as an additional defendant. (EXHIBIT "E") That complaint, like its predecessors, sought relief only under the Fourteenth Amendment of the United States Constitution.

On August 6, 1979, all defendants named in the Second Amended and Supplemental Complaint filed in the United States District Court for the District of Nevada, Las Vegas their Joint Petition for Removal. (EXHIBIT "F") On August 13, 1979, respondent Tarkanian filed a Motion to Remand (EXHIBIT "G"), and petitioner's Points and Authorities in Opposition to the motion were filed on August 28, 1979. (EXHIBIT "H") Respondent Tarkanian filed his reply on September 10, 1979. (EXHIBIT "I") Judge Foley entered an Order Granting Motion to Remand on February 19, 1980 on the grounds respondents UNLV and the Board of Regents had waived their right to remove the case to federal court by not filing a petition for removal within thirty days of service of respondent Tarkanian's original petition. (EXHIBIT "J") Petitioner filed its Answer on August 18, 1983. (EXHIBIT "K")

The action finally came to trial on June 11, 1984 before Judge Paul Goldman. During opening argument, counsel for respondent Tarkanian made the statement that he was seeking relief pursuant to 42 U.S.C. §1983. This

was the first indication petitioner had that respondent Tarkanian's claim was grounded on §1983. At the conclusion of a ten-day trial, on June 22, 1984, respondent Tarkanian served on petitioner a trial brief, which for the first time revealed to petitioner his request for attorneys' fees pursuant to 42 U.S.C. §1988. (EXHIBIT "L") Judge Goldman entered judgment for respondent Tarkanian in a written opinion issued on Monday, June 25, 1984. (EXHIBIT "M") Although the judgment entered therein specifically excluded any award of attorney fees, respondent Tarkanian served a Memorandum of Costs on petitioner on June 26, 1984, in which he requested, among other things, attorney's fees of $168,364.70. (EXHIBIT "N") Petitioner objected to the Memorandum (EXHIBIT "O"), and a hearing before Judge Goldman was scheduled for July 17, 1984, to settle the costs.

Petitioner filed a Petition for Removal on July 17, 1984, on the basis that respondent Tarkanian's sudden request for attorney fees pursuant to 42 U.S.C. §1988 raised a new federal ground for removal jurisdiction (EXHIBIT "P"). In addition, petitioner asked the court to realign the University and the Board of Regents with respondent Tarkanian for purposes of removal because it had become evident that their true interests in this litigation rest with him. Respondents UNLV and the Board of Regents refused to join in the removal petition, and, in fact, announced they would not appeal Judge Goldman's order. Thereafter, on July 25, 1984, petitioner filed a Notice of Appeal to this Court of Judge Goldman's decision (EXHIBIT "Q") and also filed motions under Rule 59 of the Federal Rules of Civil Procedure in the District Court. (EXHIBIT "R")

On August 9, 1984, respondent Tarkanian filed in the District Court a Motion to Strike NCAA's Petition for Removal, Or, Alternatively, To Remand to State Court. (EXHIBIT "S") Concurrent with that filing, respondent Tarkanian requested a stay of the District Court's ruling on petitioner's Rule 59 Motions until the Motion to Strike had been decided, which motion has subsequently been joined in by the remaining respondents.

On August 28, 1984, petitioner sought and received an extension of time from the District Court to October 31, 1984, to respond to the Motion to Strike, so that it could obtain the transcript of the trial before Judge Goldman and more fully address the grounds for removal. (EXHIBIT "U")

The transcript was ordered by petitioner from Judge Goldman's court reporter in late July, 1984, at which time its completion was promised on or about October 20, 1984. In late October, petitioner was informed by the court reporter that the transcript could not be completed by October 31, 1984. On October 30, 1984, petitioner requested a second extension of time to respond to the Motion to Strike, again on the basis the transcript was a necessary part of the petitioner's removal action. (EXHIBIT "V") Then on November 15, 1984, without ruling on petitioner's second request for extension, Judge Foley entered the Order for Remand that is the subject of this Petition for Writ of Mandamus. (EXHIBIT "W")

I. WRIT OF MANDAMUS IS AN APPROPRIATE REMEDY TO REVIEW THE DISTRICT COURT'S ORDER OF REMAND

Federal courts are statutorily created courts, and as such have only that authority conferred on them by stat-

ute. *Sheldon v. Sill*, 49 U.S. 441, 449, 12 L.Ed. 1147 (1850); *Wright v. Atlas Production Credit Association*, 468 F.2d 997 (10th Cir. 1972); *Local Division 732, Amalgamated Transit Union v. Metropolitan Atlanta Rapid Transit Authority*, 667 F.2d 1327 (11th Cir. 1982). Where a court acts outside the authority granted by statute, mandamus is appropriate to direct the lower court to set aside its unauthorized act.

28 U.S.C. §1447(c) authorizes a federal court, in certain circumstances, to remand to state court cases which have been removed:

> If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case. . . .

Where a court has remanded a case pursuant to authority granted under §1447(c), subsection (d) of that statute limits reviewability of the order for remand. *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 345-6, 96 S.Ct. 584, 46 L.Ed.2d 542 (1976). However, where the district court's remand order falls outside the terms of §1447(c) and the court has thus exceeded its authority, reviewability is not limited by subsection (d), and review by mandamus is available to set aside the Order of Remand and direct the lower court to assume jurisdiction over the case. *Thermtron Products*, 423 U.S. at 352-53.

The Federal Courts have identified two situations in which an order for remand falls outside the terms of §1447(c), both of which are applicable to the instant case: (1) the order fails to invoke the grounds specified in §1447(c); and (2) the order is issued after judgment.

A. Judge Foley's Order Does Not Rely On The Grounds Set Forth in §1447(c)

Section 1447(c) set forth above speaks to the remand of a case that "was removed improvidently and without jurisdiction." When the order of remand fails to invoke these grounds, the district court has exceeded its authority and its order should be reviewed by mandamus.

In *Thermtron Products, supra,* the district court justified remand of the case to state court because of its crowded docket and what it perceived to be an impairment of plaintiff's right of redress resulting therefrom. The Sixth Circuit denied defendants' petition for writ of mandamus, concluding that the district court had jurisdiction to enter the remand order and it was prohibited by §1447 (d) from reviewing that order. In reversing and remanding, the Supreme Court held that the district court had exceeded its authority in remanding on grounds not permitted by the controlling statute. 423 U.S. at 345. The Court further concluded that "only remand orders issued under §1447(c) and invoking the grounds specified therein . . . are immune from review under § 1447(d)." 423 U.S. at 346. Finally, "because an order remanding a removed action does not represent a final judgment reviewable by appeal," an appellate court unquestionably has the power to issue mandamus to remedy the error and require the lower court to entertain the action. 423 U.S. at 352-353.

Similarly, in *Sheet Metal Workers Int'l Assoc., AFL-CIO v. Seay,* 693 F.2d 1000 (10th Cir. 1982), *modified in part on other grounds,* 696 F.2d 780 (10th Cir. 1983), the district court had remanded the case to state court on the ground that the injunctive relief sought by plaintiff was available in state, but not federal, court. In affording relief by mandamus, the Tenth Circuit stated:

> We are persuaded that the remand order was improperly grounded on considerations not within the bounds of the removal statute, and under standards laid down by the Supreme Court in *Thermtron Products, Inc. v. Hermansdorfer,* 423 U.S. 336, 96 S.Ct. 584, 46 L.Ed.2d 542, we conclude that *we must grant the writ.*

(emphasis added) *Id.* at 1001. *See also, In Re Shell Oil Co.,* 631 F.2d 1156 (5th Cir. 1980); *In Re Greyhound Lines, Inc.,* 598 F.2d 883 (5th Cir. 1979).

The "Order for Remand" entered by Judge Foley in the instant case states:

> On July 17, 1984, the defendant National Collegiate Athletic Association (NCAA) petitioned to remove this case from the state court after trial and judgment had been entered in that court.
>
> On August 9, 1984, plaintiff, joined by the University of Nevada, Las Vegas (UNLV, moved to strike NCAA's petition for removal or, alternatively, to remand the case to the state court.
>
> On August 28, 1984, this court gave NCAA until October 31, 1984, to augment the record herein and stayed consideration of the motion to strike or remand until after October 31, 1984.
>
> This court, in this same case, granted a motion to remand the matter to the state court on February 19, 1979. See Civil LV 79-170 RDF, order granting motion to remand.
>
> Having carefully considered the matter again,
>
> IT IS ORDERED that NCAA's pending petition for removal made after trial and judgment in the state

court, is stricken. The case is again remanded to the state court.

While it is difficult to discern the basis of the District Court's order, it is clear that the order does not rely on the grounds enumerated in §1447(c). Accordingly, the District Court exeeded its authority in entering this order, and the order should be set aside by a writ of mandamus.

B. Judge Foley's Order For Remand Was Not Entered Before Judgment As Required By §1447(c).

The Order for Remand is also reviewable because §1447(d) applies only to remand orders entered "before final judgment." 28 U.S.C. §1447(c). Review by mandamus is thus appropriate when the remand order has been issued outside the time frame specified in §1447(c). *In Re Carter,* 618 F.2d 1093, 1097 (5th Cir. 1980), cert. denied, 450 U.S. 949, 101 S.Ct. 1410, 67 L.Ed.2d 378 (1981). In *Carter,* plaintiff brought suit in a Georgia state court against a local and an international labor union. The local union answered the complaint while the international did not, filing instead a motion to quash service and to dismiss. These motions were overruled, and judgment by default was entered against the international union for failure to answer plaintiff's petition. Before trial, plaintiff dismissed the local union, and the court thereafter submitted the issue of damages to a jury, which returned a verdict in excess of $60,000. This judgment was ultimatly reversed on appeal by the Georgia Supreme Court on the ground that the international union was not validly served with process. The action was reinstituted and it removed the action to federal court alleging federal case jurisdiction. At the pretrial conference in federal court, plaintiff represented that he intended to pursue only a

state-created tort claim, and not the federal claims by reason of which the case was removed. Plaintiff did not, however, move to have the case remanded, and the court did not remand on its own motion. Following entry of a sizable judgment against the international union, it moved to have the judgment vacated and the case remanded for lack of subject matter jurisdiction. In holding that the remand order was reviewable notwithstanding §1447(d) because it was entered outside the time frame specified in §1447(c), the court reasoned:

> Because Congress has so firmly stated a general policy against appellate review of remand orders, we deem it advisable to consider the end sought to be achieved by that policy and the effect on that end of a holding that remand orders entered after final judgment are reviewable.
>
> The policy underlying §1447(d) identified by the court in *Thermtron* is the preclusion of delay in litigating the merits of a controversy that would attend appellate litigation of jurisdictional issues. 423 U.S. at 351, 96 S.Ct. at 593. In speaking of one of the predecessors of §1447(d) that repealed an earlier provision permitting review of remand orders in removed cases, the Court said:
>
> > Congress . . . established the policy of not permitting interruption of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed.
>
> United States v. Rice, 327 U.S. 742, 751, 66 S.Ct. 835, 839, 90 L.Ed. 982 (1946).

> The considerations of prompt and efficient judicial resolution of substantive controversies that inform a rule of nonreviewability of remand orders issued before final judgment in a removed case do not apply with the same force to remand orders issued subsequent to entry of final judgment in a removed case.

(Footnotes omitted.) *Id.* at 1098-1099.

The holding and rationale of *Carter* should apply to the reviewability by mandamus of the District Court's order entered in the instant case. The Order of Remand was entered after judgment, and respondent Tarkanian has an injunction against petitioner. Review by mandamus of the remand order will not occasion any delay in litigating the merits of the controversy.

Because Judge Foley's remand order failed to invoke the grounds specified in §1447(c) and was entered outside the time frame prescribed in that statute, mandamus is the appropriate remedy to insure that petitioner's right to a federal forum is protected. See *Sheet Metal Workers*, 693 F.2d at 1002.

II. A WRIT OF MANDAMUS SHOULD ISSUE TO SET ASIDE THE ORDER FOR REMAND AND DIRECT THE COURT TO ASSUME JURISDICTION OVER THE CASE.

A. The Claim For Attorney's Fees Under §1988 Is A Separate And Independent Claim Which Permits Removal.

A request for attorneys' fees under §1988 is a separate and independent claim which permits removal. In a variety of contexts, federal courts have recognized that

a §1988 claim for attorneys' fees raises issues collateral to the underlying cause of action giving rise to the claim for fees, and requires an inquiry by the court separate from the decision on the merits of that other cause of action. See also, *White v. New Hampshire Department of Employment Security*, 455 U.S. 455, 451 (1982). In *Obin v. District No. 9, International Association of Machinists and Aerospace Workers*, 651 F.2d 574, 582 (8th Cir. 1981), the Eighth Circuit noted the distinction between an action and attorney's fees for prosecuting that action and concluded "that a motion for attorney's fees raises a collateral and independent claim, not an application for costs under Rule 54(d) or a matter integral to the merits of the action." See also, *Leftwich v. Harris-Stowe State College*, 702 F.2d 686, 694 (8th Cir. 1983); *Willie M. By Singer v. Hunt*, 564 F. Supp. 363, 366 (W.D. N.C. 1983); and *Young v. Powell*, 729 F.2d 563, 566 (8th Cir. 1984) ("a request for attorney's fees is not inherently or necessarily subsumed by a decision on the merits . . . the issue is uniquely separable from the cause of action to be proved at trial.").

In holding that an award of attorneys' fees under §1988 was proper where the parties had earlier settled the underlying §1983 claim a federal court in West Virginia reasoned that the claim for fees was sufficiently independent of the case in which the services were rendered to stand alone. *Hamilton v. Bruce*, 552 F.Supp. 649 651 (W.D.Va. 1982). The court further noted that the matter of the application for fees proceeds essentially on a basis that is independent of the case in chief under §1983, and the only part of the §1983 case that is important is whether the plaintiff prevailed, and not, for instance, how or why he prevailed. *Id.*

In *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 66 (1980), the Supreme Court held that Title VII of the Civil Rights Act of 1964 authorizes a lawsuit solely to obtain an award of attorneys' fees for legal work done in a prior state or local proceeding. The Court later explained that its conclusion in *Carey* rested on the premise that a claimed entitlement to attorneys' fees is independent of the merits of an action brought under Title VII alleging discrimination, and therefore supports a separate suit. *White v. New Hampshire Department of Employment Security*, 455 U.S. at 451 n. 13. Subsequently, the District Court in *Moreno v. City and County of San Francisco*, 567 F.Supp. 458, 460 (N.D.Cal. 1983) followed the decision in *Carey* and awarded attorneys' fees under §1988 in a separate and independent action from the state court proceeding in which they were incurred.

Hence, claims for attorneys' fees under the various (and comparable) fee provisions of the civil rights laws, including §1988, are separate and independent from claims brought under those provisions of the laws which afford relief from alleged violations of a plaintiff's civil rights. When raised later in an action brought to redress purported constitutional infirmities, a claim for attorneys' fees under §1988 provides new grounds for removal to federal court.

B. The Petition For Removal Was Timely Filed After Proper Notice To Petitioner Of The Federal Claim Upon Which Removal Is Sought.

A petition for removal based on a pleading other than the original complaint is governed by 28 U.S.C. §1446(b):

> If the case stated by the initial pleading is not removable, a *petition for removal may be filed within thirty days after receipt by the defendant,* through service or otherwise, *of a copy of an amended pleading,* motion, order *or other paper* from which it may first be ascertained that the case is one which is or has become removable. [Emphasis added]

In the present case, the first pleading or "other paper" advising petitioner NCAA that respondent Tarkanian was seeking attorneys' fees pursuant to federal statute, 42 U.S.C. §1988, was a trial brief served on petitioner on June 22, 1984. Oral notice of the §1988 claim allegedly given by respondent Tarkanian on June 11, 1984, during opening argument, is insufficient notice under the statute and the case law applying it. It is indisputable that notice must be in writing, and must be served personally on the defendant. *Jong v. General Motors Corporation*, 359 F.Supp. 223 (N.D. Cal. 1973); *Bonnell v. Sea Board Air Line Railroad Co.*, 202 F.Supp. 53 (N.D.Fla. 1962); *Camden Industries v. Carpenter's Local Union No. 1688*, 246 F. Supp. 252 (D.N.H. 1965); *Gottlieb v. Firestone Steel Products Co.*, 524 F.Supp. 1137 (E.D. Pa. 1981). In *Gottlieb*, the court held that oral notice of federal claims during conversations between attorneys to a lawsuit was not adequate notice of a removable claim. Obviously, a defendant cannot remove an oral pleading.

Nor did respondent Tarkanian's second amended and supplemental complaint plead §1988 attorneys' fees. Respondent's second amended and supplemental complaint not only fails to mention §1988 or its companion statute, §1983, but fails to plead essential elements of either statute. The complaint does not allege that the NCAA acted

under color of state law or that it is a person. The complaint pleads only a cause of action under the Fourteenth Amendment to the United States Constitution, and nothing more.

Assuming *arguendo* the complaint is sufficient to permit recovery under §1988 (cf. *Alford v. City of Lubbock, Texas*, 484 F.Supp. 1001, 1008 (N.D. Tex. 1979), *affirmed in part and reversed in part on other grounds*, 664 F.2d 1263 (5th Cir.), *cert. denied*, 456 U.S. 975, 72 L.Ed.2d 848, 102 S. Ct. 2239 (1982)), the complaint nonetheless cannot constitute a sufficient notice to petitioner that recovery is sought under §1988 so as to start the thirty day period running for removal on that ground. The ground on which removal is sought must appear from the face of the pleading in which it is allegedly found. *Gully v. First National Bank in Meridian*, 299 U.S. 109, 57 S. Ct. 96, 81 L.Ed. 70 (1936); *Tennessee v. Union & Planter's Bank*, 152 U.S. 454, 14 S.Ct. 654, 38 L.Ed. 511 (1894). In *Gully*, the Supreme Court remanded an action to the state court from which it had been removed because the federal action did not appear on the face of the petition. Under this "well-pleaded complaint" rule, a defendant is prevented from removing a case when the complaint does not *on its face* set forth grounds for federal subject-matter jurisdiction. Similarly, notice of a federal claim necessarily occurs only when a pleading or "other paper" makes the federal action "well-pleaded." To hold otherwise would allow a plaintiff to disguise a federal claim through the minimal requirements of notice pleading, then ambush a defendant later (and thereby circumvent removal) by contending that he should have known it was a federal claim all along. The plaintiff cannot have it both ways.

The first pleading or other paper in the instant case sufficiently well-pleaded to give petitioner notice under §1446(b) that a claim was asserted under §1988 was respondent Tarkanian's trial brief served on petitioner on June 22, 1984. Therefore, petitioner's removal to federal District Court on July 17, 1984 was timely.

III. UNLV AND THE BOARD OF REGENTS SHOULD BE REALIGNED WITH PLAINTIFF FOR PURPOSES OF REMOVAL JURISDICTION

Respondent Tarkanian contended below that remand was proper because the other named defendants (hereinafter referred to collectively as "UNLV") failed to join in the petition for removal. In light of the findings and conclusions of Judge Goldman and the evidence presented at trial, as reflected in the transcript thereof, it is apparent that respondent Tarkanian's complaint is against petitioner only, and the University and Board of Regents should be aligned with Tarkanian for removal purposes.

It is well-settled that a federal court may realign the parties to a lawsuit after removal from state court. *Meyer v. Delaware R.R. Construction Co.*, 100 U.S. 456, 25 L.Ed. 593 (1879). The proper objective of realignment is to arrange the parties so that the necessary "collision of interests" exists between them. *City of Indianapolis v. Chase National Bank*, 314 U.S. 63, 86 L.Ed. 47 (1941); 3A Moore's Federal Practice ¶2147-8. In determining whether this "collision of interests" exists, the court must look beyond the pleadings, and arrange the parties according to their real interests in the dispute. *City of Indianapolis v. Chase National Bank, supra*, 314 U.S. at 69; *Eikel v. States Marine Lines Inc.*, 473 F.2d 959, 963 (5th Cir. 1973); *Meyer v. Delaware R.R. Construction Co.*, 100 U.S. 456, 25 L.Ed. 593 (1879).

Determining the true interests of respondents UNLV and the Board of Regents in this litigation is a subjective, not objective, test. There are no mechanical rules. As the Supreme Court stated in *City of Indianapolis v. Chase National Bank, supra,* 314 U.S. at 69:

> Litigation is the pursuit of practical ends, not a game of chess. Whether the necessary "collision of interests" . . . exists, is therefore not to be determined by mechanical rules. It must be ascertained from the "principal purpose of the suit," . . . [citations omitted]

In determining the true interests of the parties to this action, the case law encourages the Court to review the record of the proceedings before Judge Goldman. In *Niles-Bement-Pond Company v. Iron Moulders Union,* 245 U.S. 77, 65 L.Ed. 145, 41 S. Ct. 39 (1920), it was held that the District Court, in determining whether to realign a party, must perform its own "scrutiny of the record" to determine whether the interests of the plaintiff and a defendant are truly adverse. In *Meyer v. Delaware R.R. Construction Co.,* 100 U.S. 456, 25 L.Ed. 593 (1879), the High Court also emphasized the importance of the federal court's review of the facts to determine the true interests of the parties on removal.

> For the purposes of a removal the matter in dispute may be ascertained, and the parties to the suit arranged on opposite sides of that dispute . . . . Under the old law the pleadings only were looked at, and the rights of the parties in respect to a removal were determined solely according to the position they occupied as plaintiffs or defendants in the suit. . . . Under the new law the mere form of the pleadings

> may be put aside, and *the parties placed on different sides of the matter in dispute according to the facts.* This being done, when all those on one side desire a removal, it may be had, if the necessary citizenship exists.

Meyer, 100 U.S. at 468-9 (emphasis added).

The true interests of respondent UNLV and the Board of Regents in this case lie with respondent Tarkanian. Both parties have but one goal: to prevent respondent Tarkanian's suspension from coaching basketball at UNLV. The transcript of the trial proceedings, which will be completed soon, and Judge Goldman's findings and conclusions clearly show this unity of interest. This fact is also evident in the decision of respondents UNLV and the Board of Regents not to appeal Judge Goldman's order. UNLV and the Board are fully aware that the injunction entered by Judge Goldman, unless appealed by them, may effectively block the suspension of respondent Tarkanian, regardless of any further action taken by the NCAA.

Numerous cases have held that antagonism between parties is a relevant consideration in determining the property of realignment, and a failure or refusal of a party to participate in litigation may be viewed as antagonistic. *Lewis v. Odell,* 503 F.2d 445 (2d Cir. 1974); *Smith v. Sperling,* 354 U.S. 91, 1 L.Ed. 1205 (1957); *Reed v. Robilio,* 376 F.2d 392 (6th Cir. 1967); *Hirsch v. Stone,* 62 F.2d 120 (5th Cir. 1932). In *Smith v. Sperling,* a shareholder derivative suit, the Court refused to realign the defendant corporation with plaintiff shareholders, citing antagonism between the plaintiffs and the corporation, as evidenced by the corporation's refusal to file the suit in the first instance. The Court stated, 354 U.S. at 96-97:

The management may refuse or fail to act for any number of reasons. Fraud may be one; the reluctance to take action against a close business associate may be another; honest belief in the wisdom of the course of action which the management has approved may be still another; and so on . . . . "The attitude of the directors need not be sinister. It may be sincere." *Whenever the management refuses to take action to undo a business transaction* or whenever, as in this case, it so solidly approves it that any demand to rescind would be futile, antagonism is evident. The cause of action, to be sure, is that of its corporation. But the corporation has become through its managers hostile and antagonistic to the enforcement of the claim. [Emphasis added and citations omitted]

Nor is the realignment of a party for failure to take action limited to shareholder derivative suits. In *Hirsch v. Stone,* 62 F.2d 120 (5th Cir. 1932), a trustee, who refused to foreclose a deed of trust upon default in payment by the makers of a promissory note, was joined as a defendant by the holders of the note. The Appellate Court refused to realign the trustee with the plaintiffs, citing the trustee's refusal to sue the defaulting parties as evidence of antagonism toward the plaintiffs. The Court stated, 62 F.2d at 122:

> [T]hough jurisdiction cannot be conferred by the collusive, colorable refusal of a trustee with title to sue . . . neither can it be defeated by realigning with plaintiffs a trustee sued as defendant, who though he should be on the same side with plaintiffs, has taken a position antagonistic to them, and has refused to act in their behalf.

Although respondents UNLV and the Board of Regents were named as defendants in this lawsuit, in truth and in fact their interests lie with respondent Tarkanian, and against the petitioner NCAA. The transcript of trial proceedings, as well as Judge Goldman's findings and conclusions, show their interests are one: to prevent respondent Tarkanian's temporary suspension from coaching basketball at the University of Nevada-Las Vegas. This fact is also evident in the decision of UNLV and the Board of Regents not to appeal Judge Goldman's findings. UNLV and the Board are fully aware that the injunction presently against them, unless appealed, may effectively block the temporary suspension of Tarkanian, regardless of any action taken by the NCAA.

CONCLUSION

The District Court, in ordering remand of this action, exceeded its authority and acted without jurisdiction. Petitioner's right to remove was predicated on two grounds: (1) assertion against it of a new, separate and independent claim, and (2) realightment of its "co-defendants," based on antagonism that surfaced during trial.

Respondent Tarkanian filed in the District Court a Motion to Strike the removal petition, which in respondent's accustomed fashion, seemed more concerned with hurling unsupported digs at petitioner than with addressing the issues. Interestingly, respondent's motion did not dispute the factual basis of petitioner's second ground, but instead attacked with fallacious principles petitioner's legal basis for realignment.

Particularly with respect to the latter ground for removal, petitioner felt that a copy of the trial transcript would lend assistance both to it in making and substantiating its arguments in response to the motion to strike,

and to the District Court in fully appreciating petitioner's grounds. The District Court granted petitioner's first request for extension of time to obtain the transcript, but then when, for reasons beyond petitioner's control, the transcript could not be completed within the time allotted and petitioner requested a second extension, the District Court entered its Order for Remand. No ruling was issued on petitioner's second request for extension, and petitioner was denied the opportunity to respond fully to the Motion to Strike.

The District Court's order is subject to review by way of a petition for writ of mandamus. In the first place, the reasons assigned for remand fall outside the reasons authorized under 28 U.S.C. §1447(c). Additionally, the order of remand was issued after final judgment. Hence, the proscriptions on review found in §1447(d) do not apply and the order should be scrutinized by this Court. In considering the aptness of mandamus, petitioner wishes to reemphasize that review will not delay a decision on the merits (as one has been rendered), but instead, issuance of the writ is necessary and appropriate in aid of the Court's jurisdiction. 28 U.S.C. §1651.

For the foregoing reasons, petitioner respectfully requests that the Court determine that jurisdiction of this action lies in federal court, and issue a writ of mandamus ordering the United States District Court for the District of Nevada to assume jurisdiction and entertain this action.

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DOCUMENT M

(Filed March 5, 1985)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-2273
DC# CV-84-460 RDF
Nevada (Las Vegas)

JERRY TARKANIAN,
Plaintiff-Appellee,

vs.

UNIVERSITY OF NEVADA, et al.,
Defendants,

and

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Defendant-Appellant.

ORDER

Before: FARRIS, CANBY and REINHARDT, Circuit Judges

The National Collegiate Athletic Association appeals a judgment rendered against it in Nevada state court. The state court judgment was removed to federal court by the NCAA on the ground that plaintiff's claim for attorney fees under 42 U.S.C. § 1983 raised a new federal cause of action. The claim for attorney fees was the sole basis for removal asserted by the NCAA. A notice of appeal from the state court judgment was filed in

district court by the NCAA before the district court had the opportunity to review the propriety of removal.

The court notes that the removal of this action to federal court was improvident. A request for attorney fees under § 1988 does not present a new or separate ground for removal where, as here, the complaint expressly alleges a violation of Fourteenth Amendment rights.

Accordingly, we remand this action to the district court with directions that the case be remanded to the Nevada state court from which it was removed.

MoCal 2/21/85

DOCUMENT N

(Filed August 25, 1985)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-7825
DC# 460 RDF
Nevada (Las Vegas)

THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Petitioner,

vs.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA,
Respondent,

and

UNIVERSITY OF NEVADA, JERRY TARKANIAN, et al.,
Real Parties in Interest.

ORDER

Before: FARRIS, CANBY and REINHARDT, Circuit Judges

The petition for a writ of mandamus is denied.

DOCUMENT O

August 30, 1977

CONFIDENTIAL

Mr. Jerry Tarkanian
c/o Samuel S. Lionel, Esq.
Lionel, Sawyer & Collins
300 South Fourth Street, #1700
Las Vegas, Nevada 89101

Dear Mr. Tarkanian:

As you are probably aware, the University of Nevada, Las Vegas has recently completed its hearings before the NCAA Committee on Infractions and Council. As a result of those hearings, the Committee on Infractions and the Council have concluded that certain infractions of NCAA rules took place, in which you were purportedly involved.

Attached please find a summary of the NCAA's determination of your involvement in this matter.

The University has been advised by the NCAA to sever you from any involvement with the University's athletic program during the University's probationary period, which is two years, or show cause to the NCAA why it should not suffer additional penalty for not having taken that action. Basically, severence from the athletic program means that you would be prevented from 1) donating money to the University's athletic program; 2) becoming a member or maintaining membership in any University athletic booster club; 3) being involved either formally or informally in recruiting of student-athletes

for the University; or 4) any other involvement, formal or informal, with the University's athletic program.

The University has scheduled a hearing on your behalf before a University hearing officer at which time you may submit information and argument to the hearing officer if you wish to contest your being severed from the athletic program. The University will have the proceedings recorded and you will be able to obtain a transcript thereof for normal transcription and reproduction costs. In addition, you will be allowed representation by an attorney if you desire, and may have witnesses testify on your behalf within reasonable time constraints. At the time set for your hearing, University legal counsel will present the information relied upon by the NCAA to arrive at its recommendation to sever you from the University's athletic program.

The hearings will be held in the office of the President, 7th Floor Humanities Building, UNLV Campus, Las Vegas, Nevada. Your hearing has been scheduled for 10:00 a.m. on Tuesday, the 6th day of September, 1977. Please notify this office (739-3201) if you do not wish to contest the proposed severence action or if you wish to either waive or reschedule your hearing. IN ANY EVENT, UNLESS YOUR HEARING IS RESCHEDULED, YOUR FAILURE TO APPEAR ON THAT DATE AND TIME NOTED SHALL CONSTITUTE A WAIVER OF YOUR HEARING RIGHTS AND A CONSENT TO SEVERENCE ACTION BY THE UNIVERSITY.

Sincerely,
/s/ Donald H. Baepler
Donald H. Baepler
President

HAND DELIVERED

DOCUMENT P

September 7, 1977

Mr. Jerry Tarkanian
Head Basketball Coach
University of Nevada, Las Vegas
Las Vegas, Nevada

Dear Jerry:

Dr. Brock Dixon, who was appointed by me to conduct your University hearing after the NCAA Council appeal, has submitted his decision to me. A copy of that decision is enclosed with this letter. I think you will find that Brock's dilemma and that of the University is well set out in the decision.

In addition, you should be aware of recent actions that the University has taken in attempting to resolve this matter. Notably, Bill Ireland and I spoke with the NCAA Committee on Infractions and Bill Hunt by conference telephone call yesterday. Despite discussion of virtually every alternative to your suspension that the University had considered and even discussion of NCAA staff suggestions on other proposals, the Committee on Infractions rejected any and all alternatives. As a result, I feel it would be impossible for the University to show cause why additional penalty should not be imposed if the University fails to take the action dictated by the Committee, and the University is simply left without alternatives.

It is, therefore, my unpleasant task to inform you that, effective 5:00 p.m., Friday, September 9, 1977, you shall be completely severed of any and all relations, formal or informal, with the University's Intercollegiate athletic program during the period of the University's NCAA

probation. Such relations shall include, but not be limited to, activities associated with administration, supervision, coaching, recruiting, athletic booster groups, and public relations or fund-raising activities related to the University's athletic program.

Please contact my office Monday morning, September 12, 1977, for an appointment in order that we might discuss your future employment duties with the University.

Sincerely,

/s/ Donald H. Baepler
Donald H. Baepler
President

cc: Mr. Samuel Lionel

DOCUMENT Q

September 6, 1977

MEMORANDUM

TO: Donald H. Baepler
President

FROM: Brock Dixon

Acting under the authority of your memorandum of August 31, 1977, at 10 a.m. this morning, I convened a hearing on the matter of NCAA sanctions as they apply to the continued association of Coach Tarkanian with the athletic program. Present were: Coach Tarkanian, Mr. Seidman representing the University's position, Mr. Sam Lionel assisted by Mr. Mark Solomon representing Coach Tarkanian. For two hours and fifteen minutes I heard evidence on the substance of the NCAA charges, Mr. Seidman ably and vigorously presenting them and Mr. Lionel just as ably and vigorously contesting them. From 12:15 p.m. to 12:45 p.m. I heard arguments dealing with the justification for the sanctions and their appropriateness and on the position the University ought to take with respect to them. Obviously, one could not in the course of three hours hear a recapitulation of all the evidence or all of the arguments which have hitherto been advanced in this matter but with the assistance of two well-prepared contending attorneys I think I can claim to have reheard enough things to justify this memorandum of findings and recommendations.

The factual basis for the NCAA's charges and sanctions as they apply to Coach Tarkanian is clearly in doubt. The University has been contending for months that the

NCAA's investigators were biased and frequently in error. In almost every factual situation delineated by the NCAA, the University's own investigation has been able to find a substantial body of conflicting evidence, some of which has been heard and considered by the NCAA and some of which has been brushed aside. Much of the NCAA case rests on what are reported to be initial statements by Robert (Jeep) Kelley. Much of Mr. Tarkanian's case has rested on evidence that the "initial statements" were not so much Kelley's as Coach Morroco's. In several instances the NCAA was given complete and to me convincing evidence that Coach Tarkanian had not done things that he has been alleged to have done.

Most serious is the charge that Coach Tarkanian attempted to frustrate the NCAA's application of the rules by getting people to "change their story" or to fabricate bodies of countervailing evidence. I am not convinced that the NCAA investigation adequately supports this charge and yet we must remember that the NCAA infractions committee and the NCAA Council, both composed of distinguished scholars, administrators, and lawyers, believed otherwise. Some of the NCAA arguments are absurd, e.g., that Kelley feared harm if he co-operated with the NCAA. What kind of harm? During the time when Kelley had little success on the court and no more in the classroom and thereafter, Tarkanian was supportive and helpful but, I think, no more so than any proper coach would be with respect to students in similar difficulties.

The NCAA authorities chose to believe that the University countered the investigation by attacking the staff. One cannot discount the belief of honorable committees and councils in their tried and proven staff members.

Neither can one accept at face value the results of investigations which show a man like Kelley at a wrong address when the question of where he lived is really at issue. One is forced to wonder why an investigator, in this case Mr. Berst, would tell his governing authorities that Kelley called him when Kelley was in fact returning Berst's own call. Mr. Lionel made the point that years of investigating experience may result in a zeal which dulls the ethics of objectivity. Mr. Seidman just as credibly argued that years of investigating experience may hone the search for truth to a sharp edge. I conclude that the motives and methods of investigators are not above challenge and in this case the methods at least were remarkably slipshod yielding bad addresses, bad dates, doubtful attributions and some inaccuracies that are gross indeed. This leads me to the Harvey Munford grade case.

Investigator McMenamin came upon a story that a basketball player named Mr. David Vaughn got a grade in a university course taught by Mr. Munford with a prior agreement that he would not have to appear or do any work. Other students including a student who was paid for typing his term paper and others who recognized this basketball player by his size, say it did not happen. Mr. Munford's attorney arranged to subject him to a professional polygraph examination which indicated that Munford's denial of the accusation was true. In this narrow instance I conclude that *good* investigation would have dug up some of the denials along with the original story, and this conclusion was strongly reinforced by a later separate hearing devoted entirely to NCAA sanctions as they affect Mr. Munford.

If one believes all or substantially all of the charges and allegations it may follow as the NCAA Council asserts that Coaches Bayer and Tarkanian "knowingly and willfully" tried to operate the basketball program in violation of NCAA rules and in that case there must have been failure of one or both to report offenses against those rules and participation by one or both in certification of compliance which were not true. The NCAA authorities believed enough of the allegations to activate the domino effect which validates these last points.

I turn now to the arguments concerning the proposed sanctions. It is clear that to the extent that the University ignores them it invites reconsideration by NCAA authorities and one must believe that they will impose heavier and not lighter penalties. Accordingly, our action or non-action with respect to the proposed sanctions is consequential indeed. If we do not implement them we invite heavier penalties and if we do we are asked among other things to disassociate from his professional duties without normal notice a tenured member of the professional staff.

Mr. Seidman argues persuasively that by joining the NCAA we delegated to that organization the establishment of governing standards and their enforcement as well. We are allowed and encouraged to make our own investigations but this is in no way a substitute for the investigative functions of the NCAA itself. We must live by our commitments to the NCAA, its standards and its machinery. We must accept their findings of fact as in some way superior to our own and, if we do not like the way the NCAA works, our remedy is to work for reform within the organization. In this instance we could

wish for standards and due process and evidence far superior to that which we have observed, but given the terms of our adherence to the NCAA we cannot substitute —biased as we must be—our own judgment on the credibility of witnesses for that of the infractions committee and the Council. Mr. Seidman further argues that no one could be a better judge of the appropriateness of sanctions to circumstances than the NCAA governing bodies which make all of the investigations and impose all of the sanctions. Appropriateness is to be judged largely in terms of what has happened to other schools in roughly similar positions and we cannot substitute our judgment for the NCAA's on this point.

Mr. Lionel agrees that the University did delegate to the NCAA along the lines argued by Mr. Seidman. He goes on to say that there must be limits on the breadth of this delegation and that the University must never have intended to delegate the power to punish without even minimum respect to due process. He argues that there was not a minimum of respect for Mr. Tarkanian's or the University's rights, pointing out that the University was never able to get any guidelines on preparing its appeal or any indication of how appeals might be handled, that the NCAA never investigated Mr. Berst's motives even after we questioned them, that we did not know the source of the original allegations until a formal hearing stage had been reached, that Coach Tarkanian was never given an opportunity to confront or cross-examine, that the University was never able to get a transcript of hearings for study, and finally, that the NCAA Council made its findings and affirmation without ever having had an opportunity to see the transcripts of earlier hearings. Mr. Lionel argued that for the Univer-

sity to impose a sanction under these circumstances is to become a party to a grave injustice.

I find:

1. That the NCAA's delegation by the terms of our adherence is as broad as Mr. Seidman argues.
2. That in this instance the NCAA's standards of proof and due process were inferior to what we might reasonably expect of any organization to which we belong and that institutionally we must work for a reform of the NCAA in these respects. (I agree that the NCAA is a proper judge of the appropriateness of certain sanctions to certain kinds of offenses.)

Here are alternatives:

1. Reject the sanction requiring us to disassociate Coach Tarkanian from the athletic program and take the risk of still heavier sanctions, e.g., possible extra years of probation.
2. Recognize the University's delegation to the NCAA of the power to act as ultimate arbiter of these matters, thus reassigning Mr. Tarkanian from his present position—though tenured and without adequate notice—even while believing that the NCAA was wrong.
3. Pull out of the NCAA completely on the grounds that you will not execute what you hold to be their unjust judgments.

I recommend that you execute the proposed sanctions of the NCAA as they apply to Coach Tarkanian.

DOCUMENT R

CONFIDENTIAL REPORT NO. 123 (47)

By the NCAA Committee on Infractions

to the

NCAA COUNCIL

Case No. 443 - University of Nevada, Las Vegas

This report is filed in accordance with Section 6 of the Official Procedure Governing the NCAA Enforcement Program, and is organized in five sections, as follows:

I. Violations of NCAA requirements or questionable practices in light of NCAA requirements, as determined by Committee.

II. Penalty to be imposed upon institution, as proposed by Committee.

III. Origin of case.

IV. Related factors appropriate for consideration in judgment of case.

V. Disciplinary or corrective actions taken by institution or conference, or any other agency involved in particular incident.

Pursuant to the appeal initiated by the University of Nevada, Las Vegas, under Section 5 of the Official Procedure Governing the NCAA Enforcement Program, the Committee on Infractions will submit Report No. 123(47) to the Council of the National Collegiate Athletic Association at its meeting in Knoxville, Tennessee, August 22, 1977.

Case No. 443

[University of Nevada, Las Vegas]

[NOTE: The NCAA MANUAL citations in this report are from the 1976-77 NCAA MANUAL which was in effect at the time the Committee on Infractions' initial Confidential Report No. 123 (47) was forwarded to the University of Nevada, Las Vegas. Each finding of violation appealed by the University of Nevada, Las Vegas, is identified by an asterisk (*). Information submitted by the Committee on Infractions related to each appealed finding of violation directly follows the finding and is separated by a line.]

I. Violations of NCAA requirements or questionable practices in light of NCAA requirements, as determined by Committee.

A. Violations of the principles governing expenses, extra benefits and financial aid to student-athletes [NCAA Constitution 3-1-(g)-(5), 3-1-(g)-(6) and 3-4-(a)].

1. During the 1971-72 academic year, then head basketball coach John Bayer arranged for student-athlete Dan Cunningham to be provided the benefit of round-trip commercial airline transportation at no cost to Cunningham between Las Vegas, Nevada, and his home in Salinas, California, in order for the young man to return home for Christmas vacation.

*2. In November 1973, through the arrangements of head basketball coach Jerry Tarkanian and Frank Denton, a representative of the

University's athletic interests and operator of the American Tour and Travel Service, Las Vegas, Nevada, student-athlete Robert "Jeep" Kelley was provided one-way airline transportation at no charge to Kelley from Las Vegas, Nevada, to his home in Pittsburgh, Pennsylvania; further, at the time the young man returned to the University, Tarkanian reimbursed Kelley in cash for the cost of one-way commercial airline transportation from Pittsburgh to Las Vegas.

The Committee's finding is based upon information reported to the NCAA by Robert Kelley on May 15, 1975. It should be noted that the University does not dispute that Kelley traveled from Las Vegas to Pittsburgh in November 1973, and returned to Las Vegas after remaining in Pittsburgh for several days. Further, there is no dispute that the cost of the return trip to Las Vegas was initially paid through the arrangements of Kelley's former high school principal, James Robinson.

However, based primarily upon information developed by the institution in its review of this allegation with Jerry Tarkanian and Kelley, the University denies that the initial trip was arranged by Jerry Tarkanian and Frank Denton, and denies that Tarkanian reimbursed Kelley for the costs incurred to return to Las Vegas. After reviewing all the information reported in this case, the

Committee has concluded that Kelley provided the NCAA accurate information during his initial May 15, 1975, interview even though information he later reported to the University was substantially different. Basically, the Committee believes that Kelley was improperly encouraged and pressured to provide the University false information during its investigation of this matter as described by the young man and his aunt, Frances Parker, in Part I-F-1 of this report. Also, no information has been reported to the Committee which would satisfactorily explain why Kelley would report false information to the NCAA during his initial May 15, 1975, interview.

It should be noted the University has charged that the information upon which the Committee bases its conclusion was never reported to the NCAA by Kelley. The Committee has carefully considered this question as described in Part IV-E of this report. In addition, please note Part IV-C of this report further explains the Committee's thinking with regard to the University's investigation of allegations involving Kelley.

The University has indicated it does not believe Denton should be considered a representative of the University's athletic interests. In this regard, the Committee notes that in correspondence exchanged between Denton and Tarkanian during the summer 1973, Denton offered to arrange cost-free, personal

air travel for Jerry Tarkanian, his family, assistant coaches, friends and athletes on "junket" flights. It should also be noted that Tarkanian did not decline this offer of assistance from Denton for members of the University's basketball team, and actually identified Kelley as an individual who could benefit from this service. As the Committee and Council have found in numerous cases in the past, when an individual becomes associated with the promotion of an institution's intercollegiate athletic program (i.e., by contacting a member of the University's coaching staff to offer assistance to student-athletes) such an individual is considered to be a representative of the University's athletic interests, and the University becomes responsible for his actions to assist student-athletes. Further, the Committee believes the University is well aware of its responsibility in this regard, and notes that Tarkanian wrote a June 11, 1973, letter to Denton describing the application of NCAA regulations to Denton's offer of assistance.

*3. During the 1973-74 academic year, head basketball coach Jerry Tarkanian provided student-athlete Robert "Jeep" Kelley the name and telephone number of Frank Denton, a representative of the University's athletic interests and operator of the American Tour and Travel Service, Las Vegas, for the purpose of assisting Kelley in obtaining personal airline transportation at no cost to him; fur-

ther, after Kelley followed Tarkanian's instructions, Denton actually arranged for the young man to receive the benefit of round-trip airline transportation at no cost to Kelley between Las Vegas and Pittsburgh at the time he visited his home at the conclusion of the 1973-74 basketball season and again during August or September 1974, prior to the start of classes for the 1974-75 academic year.

The Committee's finding is based upon information provided to the NCAA by Robert Kelley on May 15, 1975. It was noted that in reporting this information, Kelley not only identified Frank Denton as the individual arranging this transportation but also recalled the telephone number of Denton's place of business, American Tour and Travel Service. The Committee believes it is unlikely Kelley would have recalled this number unless he had occasion to utilize Denton's services as described. The University bases its position primarily upon information developed during its interviews with Tarkanian, Denton and Kelley. In this regard, the Committee again directs the Council's attention to Parts I-F-1, IV-C and IV-E of this report for additional information concerning the Committee's position in regard to allegations involving Kelley.

The Committee believes Denton is a representative of the University's athletic interests

for the reasons set forth in Part I-A-2 of this report. In addition, the Committee asks the Council to note that in regard to this finding, Kelley would not have been in a position to receive the benefit of cost-free airline transportation without the assistance of Tarkanian in contacting Denton, thereby establishing a relationship between Denton and the University's basketball coaching staff which led directly to the violation in question.

It should be noted the Committee does not accept the University's contention that the benefit of cost-free airline transportation on "junket" flights is available to *all* members of the University's student body in general. Rather, information reported to the Committee indicates that this benefit is limited to individuals satisfying certain conditions established by the operators of such flights. Such conditions include a personal interview to insure the flight is a matter of necessity and not pleasure, receipt of a request from a friend of the junket operator, or a specific offer of assistance to seleceted individuals by the junket operator. Information has not been reported to establish that *all* students enrolled in the University who desire to travel are permitted to take advantage of this benefit at the discretion of the student. In fact, Denton's June 6, 1973, letter to Tarkanian offers this service only to Jerry Tarkanian, his family, assistant coaches, friends and athletes.

*4. Through the arrangements of Frank Denton, a representative of the University's athletic interests and operator of the American Tour and Travel Service, Las Vegas, Nevada, student-athlete Ricky Sobers received the benefit of personal airline transportation at no cost to him between Las Vegas and his home in New York on at least one occasion during his attendance at the University (1973-74 and 1974-75 academic years).

The finding is based upon information initially reported to the NCAA by Ricky Sobers on August 14, 1975.

The University contends that although Sobers received the benefit of cost-free transportation on one occasion, it was not through Denton's arrangements. In considering this matter, the Committee was unable to determine why Sobers would initially report to the NCAA that Denton arranged the transportation in question if, in fact, he did not. To review additional information concerning the reasons the Committee accepts Sobers' initial report to the NCAA, rather than the change in detail related to Denton's involvement which was developed in the University's interview with Sobers, the Council's attention is directed to Part IV-C of this report. Further, the Committee believes Denton is a representative of the University's athletic interests for the reasons cited in Part I-A-2 of this report. The Committee also notes that

in Tarkanian's June 11, 1973, letter to Denton, Sobers is identified as an individual who could benefit from Denton's services.

B. Violation of the principles governing extra benefits to student-athletes [NCAA Constitution 3-1-(g)-(6)].

*1. During the 1972-73 academic year, then head basketball coach John Bayer arranged for student-athletes Pat Bolster and Dan Cunningham to be provided entertainment at one or more dinner shows featuring Buddy Hackett and Charo at the Sands Hotel in Las Vegas at no cost to the young men; further, on one occasion, Bolster's parents accompanied the young men at no charge to them.

The Committee's finding is based upon information reported to the NCAA by Dan Cunningham on January 18, 1974, as well as by Pat Bolster on March 8, 1976. The University agrees that Bayer made reservations on at least one occasion for these young men but indicates that Bayer was unaware the young men would not be required to pay the costs associated with this entertainment. The Committee believes it is unlikely that the young men would have found it necessary to ask Bayer to make these reservations in this instance unless they expected to receive a special benefit. Further, Cunningham confirmed to the NCAA that he never expected to pay the costs associated with this entertainment.

C. Violations of the principles governing extra benefits and financial aid to student-athletes [NCAA Constitution 3-1-(g)-(6) and 3-4-(a)].

1. During the 1971-72 and 1972-73 academic years, then head basketball coach John Bayer gave student-athlete Dan Cunningham a monthly cash allowance of approximately $100, which was not administered by the University's regular scholarship awards authority, in addition to a full institutional grant-in-aid which Cunningham already was receiving.

*2. During the 1971-72 and 1972-73 academic years, then head basketball coach John Bayer gave student-athlete James Baker a monthly cash allowance of approximately $50, which was not administered by the University's regular scholarship awards authority, in addition to a full institutional grant-in-aid which Baker was already receiving.

The Committee's finding is based on information reported by John Bayer to the NCAA on April 3, 1974. On that occasion, Bayer described in detail negotiations he conducted with Baker when the young man threatened to transfer from the University unless he was provided a cash allowance; further, Bayer reported that these negotiations resulted in the provision of a cash allowance of $50 per month to Baker. It should be noted that student-athlete James Baker refused to be interviewed by the NCAA in this case, although he has stated to the University that this information is false. Also, Bayer later denied to the University that he provided this allowance to Baker. The Committee believes that Bayer reported accurate information in his first interview with the NCAA based on his recollection of specific details related to negotiations resulting in the provision of this allowance to Baker. The Committee notes that during the period of time in question, Bayer was providing $100 cash per month to another student-athlete as set forth in Part I-C-1 of this report.

*3. During the 1972-73 academic year, student-athlete James Baker was provided the use of a 1973 Ford Thunderbird automobile at no cost to the young man; further, the automobile was obtained by the young man from the Sam Krug Chrysler-Plymouth agency which was owned by Sam Krug and Art Thomas, representatives of the University's athletic interests.

After reconsideration of this finding in light of the University's appeal, the Committee agrees that there is not sufficient information to warrant a finding in this instance. Accordingly, the Committee withdraws this finding and requests the Council to delete it from this report.

In the Committee's judgment, the deletion of this finding should not affect the proposed

penalty in this case, other than to remove the names of Sam Krug and Art Thomas from the list of representatives of the University's athletic interests to be severed from the institution's intercollegiate athletic program as set forth in Part II-F-3 of this report.

*4. During the 1971-72 and 1972-73 academic years, then head basketball coach John Bayer and Richard Davis, Fair and Davis Real Estate Company and a representative of the University's athletic interests, arranged for selected members of the University's intercollegiate basketball team to reside in the Flamingo East Apartments, Las Vegas, Nevada, at no cost to the young men; further, each of the student-athletes continued to receive a full athletic grant-in-aid at the University, including a room allowance while residing cost free in these apartments; finally, among the student-athletes who have enjoyed this benefit during their attendance at the University are James Baker, Don Weimer, Eddie Taylor and Dan Cunningham.

This finding is based primarily upon information reported to the NCAA on December 16, 1975, by Noel Pion, former manager of the Flamingo East Apartments. Pion reported that Richard Davis agreed to provide former head basketball coach John Bayer an apartment on a cost-free basis. Bayer then made this apartment available to selected

student-athletes on a rent-free basis. Pion reported that student-athletes James Baker, Dan Cunningham, Eddie Taylor and Don Weimer resided in this apartment at no personal expense through these arrangements. The University acknowledges that at least three of the student-athletes in question (Baker, Taylor and Weimer) did, in fact, reside at the Flamingo East Apartments for a period of time, but has appealed this finding based on information developed in interviews with the young men and Richard Davis. To review additional information concerning the reasons the Committee accepts the information provided by Pion as opposed to that reported by the former student-athletes in question and Davis, the Council's attention is directed to Part IV-C of this report.

The Committee has identified Davis as a representative of the University's athletic interests based on the fact that he has made available an apartment to the University's athletic department for several years to house coaches visiting Las Vegas, and because he is a former secretary-treasurer of the University's athletic booster club.

*5. During a portion of the 1973-74 and 1974-75 academic years, Mr. and Mrs. Burrell Cohen, representatives of the University's athletic interests, permitted student-athlete Robert "Jeep" Kelley to reside cost free in their home in Las Vegas.

The Committee's finding is based upon information reported to the NCAA by Robert Kelley initially on May 15, 1975, and again on March 5, 1976. Kelley initially indicated in 1975 he resided cost free in the Cohen home as described in this finding. On March 5, 1976, Kelley reported to the NCAA that the Cohens had contacted him to request that he report to the NCAA that he paid $70 rent per month during the period he resided in the Cohen home. The Committee notes that this request was made after Mr. and Mrs. Cohen's January 15, 1976, interview with an NCAA enforcement representative, at which time the Cohens reported that Kelley had paid $75 per month for rent. It is the Committee's belief that Cohen requested Kelley to report inaccurate information in order to corroborate the false information the Cohens already had provided the NCAA. The Committee also directs the Council's attention to Parts I-F-1, IV-C and IV-E of this report which present additional information concerning the Committee's position in regard to allegations involving Kelley.

It should be noted that during the summer 1973, Cohen wrote Jerry Tarkanian to advise him of plans to assist Kelley in adjusting to college life. In addition, Cohen contacted Tarkanian at the time Kelley established residence in the Cohen home and discussed

the arrangements for the young man's lodging. It is the Committee's position that these actions establish Cohen and his wife (who was also involved in these arrangements) as representatives of the University's athletic interests for purposes of applying NCAA regulations.

*6. During the 1973-74 academic year, head basketball coach Jerry Tarkanian arranged for student-athlete Robert "Jeep" Kelley to be given a shirt and two pairs of slacks at no cost to the young man by a salesman at a Mr. Slacks clothing store, Las Vegas, Nevada.

The Committee's finding is based upon information reported to the NCAA by Robert Kelley on May 15, 1975. Kelley stated that he obtained the shirt and slacks through the arrangements of Tarkanian as found by the Committee.

The University's appeal is based primarily on information developed during its interviews with Kelley. As previously noted, the Committee believes that after Kelley provided information to the NCAA related to this and other findings, he was improperly encouraged and pressured to provide the University false information. In this regard, the Committee again directs the Council's attention to Parts I-F-1, IV-C and IV-E of this report.

*7. On one occasion during the 1973-74 or 1974-75 academic year, student-athlete Ricky

Sobers was given a suede jacket, a pair of slacks and at least two shirts by a salesman at a Mr. Slacks clothing store, Las Vegas, Nevada.

The Committee's finding is based upon information reported to the NCAA by Ricky Sobers on August 14, 1975. Sobers reported he was given these items of clothing by a salesman at the identified clothing store in recognition of two victories by the University's intercollegiate basketball team. Although substantially different information was developed by the University during its interview with Sobers, the Committee was unable to determine why Sobers would initially report this information to the NCAA if, in fact, it was not true. For additional information concerning the reasons the Committee accepts the information initially reported by Sobers, the Council's attention is directed to Part IV-C of this report.

It should be noted that the Committee did not consider this finding in determining an institutional penalty in this case. Although it is clear in the Committee's opinion that this clothing was provided to Sobers because he was an athlete, the Committee was unable to determine whether the involved salesman was a representative of the University's athletic interests. Therefore, the Committee did not believe the University should bear any institutional responsibility for the violation.

*8 During the 1973-74 and 1974-75 academic years, student-athlete Ricky Sobers received the benefit of numerous meals at no cost to him at the Las Vegas Hilton Hotel through the arrangements of Howard Kincaid, a representative of the University's athletic interests; further, Sobers was receiving a full athletic grant-in-aid at the University, including a meal allowance, at the time he was receiving this benefit.

The Committee's finding is based upon information reported to the NCAA by Ricky Sobers on August 14, 1975. Further, both Sobers and Howard Kincaid confirmed the substance of this finding in their interviews with the University. However, it is the position of the University that Kincaid should not be considered a representative of the institution's athletic interests, and that the meals in question should be considered permissible pre-game meals incidental to Sobers' participation in intercollegiate basketball competition.

In this regard, the Committee notes that the University has no records to support the provision of these meals to Sobers as part of the actual and necessary expenses related to his participation on the University's basketball team; further, Sobers initially reported to the NCAA that he could and did obtain complimentary meals through Kincaid's arrangements any time he (Sobers) so desired.

In addition, the Committee believes that Kincaid must be considered a representative of the University's athletic interests inasmuch as he has assisted members of the University's basketball coaching staff by arranging the provision of complimentary meals and entertainment for college basketball coaches visiting the Las Vegas area and, therefore, is involved in promoting the University's intercollegiate athletic program; further, Kincaid was fully aware of Sobers' participation as a member of the University's basketball team at the time he provided complimentary meals for the young man.

D. Violation of the principles governing institutional control [NCAA Constitution 3-2].

*1. The involvement of Ann Cohen, Burrell Cohen, Richard Davis, Frank Denton, Howard Kincaid, Sam Krug, Harvey Munford, Rodney Parker, Art Thomas and Brad Welch, representatives of the University's athletic interests, in numerous violations set forth in this report demonstrates that the University of Nevada, Las Vegas, did not adequately exercise institutional control and responsibility over these individuals.

If the Committee's other findings set forth in this report involving the identified representatives are accepted or upheld for the most part by the Council, the Committee believes this finding to be supported without need

for further explanation or justification. The parts of this report involving each individual are: Ann Cohen, I-C-5; Burrell Cohen, I-C-5; Richard Davis, I-C-4; Frank Denton, I-A-2, I-A-3 and I-A-4; Howard Kincaid, I-C-8; Harvey Munford, I-H-6 and I-H-7; Rodney Parker, I-K-1, I-M-1 and I-N-3, and Brad Welch, I-M-1.

[NOTE: The names of Sam Krug and Art Thomas should be deleted from this finding in light of the Committee's action to withdraw its finding as set forth in Part I-C-3 of this report.]

E. Violations of the principles governing ethical conduct [NCAA Constitution 3-6-(a)].

*1. Former head basketball coach John Bayer as well as present head basketball coach Jerry Tarkanian acted contrary to the principles of ethical conduct inasmuch as they did not, on all occasions, deport themselves in accordance with the generally recognized high standards normally associated with the conduct and administration of intercollegiate athletics, in that their involvement in various violations in this case demonstrates a knowing and willful effort on their part to operate the University's intercollegiate basketball program contrary to NCAA legislation.

If the Committee's other findings set forth in this report involving Jerry Tarkanian are accepted or upheld for the most part by the Council, the Committee believes this finding

to be supported without need for further explanation or justification. The parts of this report involving Tarkanian are I-A-2, I-A-3, I-C-6, I-F-1, I-H-7, I-M-1 and I-O-2. It should be noted that this finding, as it relates to John Bayer, is not being appealed by the University.

F. Violation of the principles of ethical conduct and the cooperative principles governing the NCAA enforcement program [NCAA Constitution 3-6-(a), Bylaw 7-5-(d) and the opening statement of the Official Procedure Governing the NCAA Enforcement Program].

*1. During the course of the NCAA's investigation into the athletic policies and practices of the University's intercollegiate basketball program, Jerry Tarkanian contacted and arranged for other individuals to contact principals involved in the case in an effort to discourage them from reporting information related to violations of NCAA regulations when contacted by members of the NCAA enforcement staff, and in an effort to cause them to give untruthful information to the University. Specifically, among the individuals who have been contacted for this reason by or through the arrangements of Tarkanian are former student-athlete Robert "Jeep" Kelley and Frances Parker, Port Chester, New York.

The Committee's finding is based on information reported to the NCAA by Robert

Kelley and his aunt, Frances Parker, during a period beginning March 5, 1976, and ending December 10, 1976. It should be noted that during this period, the University was actively investigating allegations submitted to it by the NCAA in order to prepare a response to the Committee's February 25, 1976, official inquiry. Inasmuch as the Committee believes this finding is most serious, it wishes to call the following information to the Council's attention:

(a) On March 5, 1976, Mrs. Parker (Port Chester, New York) telephoned an NCAA investigator to report that Kelley (who was residing in Pittsburgh, Pennsylvania) was frightened because he had been told by Jerry Tarkanian that the attorney general from Nevada wished to question him in Nevada because he had provided information to the NCAA. Mrs. Parker also reported that she had been contacted by Mrs. Burrell Cohen (Las Vegas, Nevada) who told her that certain unidentified individuals in Las Vegas wished to talk to her. Mrs. Cohen (identified in the finding set forth in Part I-C-5 of this report) stated that her husband (also identified in the finding set forth in Part I-C-5 of this report) would forward an airline ticket to Mrs. Parker to travel to Las Vegas to "look over the city." Mrs. Parker declined this offer.

(b) On March 5, 1976, an NCAA investigator telephoned Kelley. Kelley reported that Tarkanian recently had told him the attorney general from Nevada wanted to talk with him. Kelley said he was reluctant to admit to Tarkanian that he had previously provided information to the NCAA, and indicated he was concerned in that he did not want himself or his family to be harmed based on his involvement in the case.

(c) On April 2, 1976, Mrs. Parker reported to the NCAA that Kelley had told her he felt obligated to assist Tarkanian in some way in order to insure that his half-brother (Sonny Lewis) would be able to participate in college basketball.

(d) On April 5, 1976, Mrs. Parker reported to the NCAA that Kelley's former high school principal, James Robinson, and Kelley's former high school basketball coach, Spencer Watkins, were pressuring Kelley to sign a statement in Tarkanian's behalf and to travel to Las Vegas. Mrs. Parker reported these individuals told Kelley that if he refused to help Tarkanian it would affect the chances of Sonny Lewis (who was attending Kelley's former high school) to participate in collegiate basketball competition. Mrs. Parker said that Kelley no longer wished to be involved in providing information to the NCAA in this case because he was

receiving excessive pressure to assist Tarkanian from individuals contacting him on Tarkanian's behalf. In this regard, she reported that an attorney from Pittsburgh named DeCello also was attempting to contact Kelley.

(e) Later on April 5, Mrs. Parker telephoned an NCAA investigator to report that Sonny Lewis had just advised her by telephone that Kelley left earlier that afternoon for Las Vegas. Kelley apparently planned to be employed by a construction company in Las Vegas. Further, Lewis told Mrs. Parker that Kelley did not have funds to purchase the airline ticket for this trip, and that someone had provided the ticket for him.

(f) On April 21, 1976, Mrs. Parker reported to the NCAA that Kelley telephoned her from the home of Burrell Cohen in Las Vegas, where Kelley was residing. She reported that Kelley had been contacted by an attorney in Pittsburgh prior to leaving for Las Vegas; further, that a job had been arranged for Kelley in Las Vegas by Tarkanian and Cohen. Kelley reported to Mrs. Parker that he agreed to travel to Las Vegas in an effort to take pressure off of himself and his family in Pittsburgh.

(g) On April 22, 1976, Kelley telephoned an NCAA investigator and reported the following information. Kelley explained

that Cohen had telephoned him in Pittsburgh to advise him that an attorney, Anthony DeCello, wished to talk to him. At the same time, Spencer Watkins, Kelley's former high school coach, was pressuring Kelley to travel to Las Vegas where he would be employed. DeCello, who described himself as an attorney representing the University of Nevada, Las Vegas, met with Kelley in Pittsburgh and then purchased an airline ticket for Kelley to travel that day from Pittsburgh to Las Vegas. Kelley said that he reported false information concerning this case during his conversation with DeCello in an attempt to show that he was on DeCello's side. Kelley also reported that he was residing cost free in the Cohen home while in Las Vegas and that Cohen had arranged to provide him an automobile at no cost. Also, he indicated that Tarkanian had arranged a construction job for him.

(h) On May 11, 1976, Kelley telephoned an NCAA investigator and reported that Tarkanian was en route to the Cohen home to obtain Kelley's signature on some prepared statements. Kelley was concerned about what he should do inasmuch as he believed from his previous conversations with Tarkanian that the statements would contain false information designed to assist Tarkanian in de-

fending himself against the NCAA. Kelley asked what effect his signing false statements would have upon the NCAA's case, and was told that he should attempt to be truthful in his statements to the University, but if he felt compelled to sign false statements, he should remain in contact with the NCAA to explain the reasons for his actions. Later that same evening, Kelley telephoned the NCAA investigator again to report that Tarkanian had, in fact, requested him to sign statements containing false information similar to that he previously had provided DeCello in Pittsburgh. However, Kelley telephoned Mrs. Parker in the presence of Tarkanian and was advised by his aunt not to sign the statements until she was able to review them. Kelley also reported that on this occasion Tarkanian had offered to arrange for him to try out with the Los Angeles Lakers professional basketball team or to arrange for him to participate in a summer basketball league conducted by a friend of Tarkanian's in Southern California.

(i) On May 12, 1976, Mrs. Parker telephoned an NCAA investigator and reported information corroborating Kelley's description of events occurring the previous evening involving herself, Kelley and Tarkanian. In addition, she indicated that Kelley was concerned about the

pressure placed on him in Las Vegas. Mrs. Parker also recalled that Mrs. Lois Tarkanian had telephoned her on an earlier occasion, stating that if the "NCAA finds out anything," her husband (Jerry Tarkanian) would lose his job. Mrs. Parker viewed this telephone call as an attempt by Mrs. Tarkanian to persuade her not to report information against the interests of Jerry Tarkanian.

(j) In July 1976, Kelley telephoned an NCAA investigator and reported that he had returned to Pittsburgh and, in fact, had signed various false statements in Las Vegas at Tarkanian's request. Kelley reported that Tarkanian planned to assist him in enrolling in another collegiate institution, possibly somewhere in California. Kelley stated that he hoped his actions would not hurt the NCAA's case.

(k) On September 28, 1976, Mrs. Parker reported to an NCAA investigator that Kelley was planning to travel to California to enroll in a collegiate institution, but apparently was going to stop in Las Vegas on the way.

(l) On November 29, 1976, Kelley telephoned an NCAA investigator from Honolulu, Hawaii. Kelley reported that Tarkanian arranged for him to attend school in California, but at the last minute was able to arrange for him to receive a bas-

ketball scholarship at the University of Hawaii. Kelley reported that when he left Pittsburgh that September, Tarkanian had arranged for him to travel to Las Vegas on a "junket" flight via United Airlines at no cost to him. Upon arriving in Las Vegas, he resided in the Cohen home cost free for approximately three weeks before traveling on to Hawaii. Kelley reported that while residing in the Cohen home, he was requested to sign additional statements he described as containing "the same lies as before." Thereafter, Cohen gave Kelley approximately $600-$700 which he utilized to pay his transportation costs to Hawaii, as well as his living expenses prior to receiving scholarship assistance from the University of Hawaii.

The Committee believes the information reported to the NCAA during this period by Kelley and Mrs. Parker clearly supports the finding that pressures were applied and various inducements were offered and provided in order to insure Kelley's assistance in protecting the interests of the University and Tarkanian in this case. Further, the Committee believes this finding represents a most serious violation of NCAA legislation in that Tarkanian's actions are contrary to and reflect disregard for the cooperative principles of the NCAA enforcement program and the basic principles of ethical conduct. In this

regard, the Committee directs the Council's attention to the opening statement of the Official Procedure Governing the NCAA Enforcement Program adopted by the Association's membership. This statement reads as follows:

"Individuals employed by or associated with member institutions for the administration, the conduct or the coaching of intercollegiate athletics are, in the final analysis, teachers of young people. Their responsibility is an affirmative one, and they must do more than avoid improper conduct or questionable acts. Their own moral values must be so certain and positive that those younger and more pliable will be influenced by a fine example. Much more is expected of them than of the less critically placed citizen.

"All representatives of educational institutions are expected to cooperate fully with the NCAA investigative staff, Committee on Infractions and Council to further the objectives of the Association and its enforcement program. The enforcement procedures are an essential part of the intercollegiate athletic program of each member institution and require full and complete disclosure by all institutional representatives of any relevant information requested by the NCAA investigative staff, Committee on Infractions or Council during the course of an inquiry."

G. Violation of the principles governing eligibility of student-athletes, and the provisions governing recruiting and institutional eligibility for championship events [NCAA Constitution 3-9-(e); Bylaws 1-1-(a) and 4-6-(b)].

*1. In the summer following the 1970-71 academic year, then head basketball coach John Bayer arranged for prospective student-athletes Dan Cunningham, Salinas, California; James Baker, Philadelphia, Pennsylvania; Eddie Taylor, Philadelphia, Pennsylvania, and Don Weimer, Chula Vista, California, to be provided the correct answers to questions contained on a precollege enrollment test prior to the time the test was to be administered to the young men at the institution; further, these arrangements were made by Bayer to insure that each young man achieved a high enough score on the test to qualify for athletically related financial assistance, practice and play during the 1971-72 academic year at the University under the prediction requirements of NCAA Bylaw 4-6-(b) [1.600 rule]; further, prior to the test, Bayer arranged for then assistant basketball coach Fred Albrecht to assist the young men in memorizing the correct answers to the test, as well as the questions to answer incorrectly in an effort to avoid calling attention to the young men's unusually high test scores; finally, these improperly achieved test scores were actually utilized by the University to establish each young man's eligibility for aid, practice and play during the 1971-72 academic

year under the requirements of the 1.600 rule.

The Committee's finding is based upon information reported to the NCAA by Dan Cunningham in the presence of his parents in January 1974, as well as supporting information provided by John Bayer, Eddie Taylor and the parents of Don Weimer. In this regard, it should be noted that Bayer was interviewed by the NCAA on April 3, 1974, concerning this matter. Following a description by the NCAA investigator of his understanding of the information set forth in this finding (i.e., that the young men were actually given the correct answers to the test in question, and were also told which questions should be answered incorrectly), Bayer confirmed at that time that the NCAA was aware of "what went on with the test." Further, Bayer then suggested that the NCAA investigate testing procedures utilized in situations involving several additional athletes enrolled in the University. The Committee believes Bayer's comments represent an acknowledgement of the facts of this finding, and the Committee asks the Council to also note that at the time he was initially confronted with this information by the NCAA, Bayer did not make any statement to deny the facts set forth in this finding.

Further, Dan Cunningham has confirmed the information set forth in this finding in his

interview with the University. Although Bayer and Taylor have provided substantially different information to the University than they initially reported to the NCAA, the Committee accepts the information originally provided by these individuals and in this regard again directs the Council's attention to Part IV-C of this report.

The Committee also notes that based on a review of each young man's academic background and previous test scores, it appears highly improbable that the young men could have achieved legitimately the scores credited to them in this instance. In this regard, the Committee believes the information reported by the principals in this situation is sufficient to support the Committee's finding; however, it should be noted that additional data concerning each young man's actual test scores and academic background is a matter of record in this case and is available for the Council's consideration.

It should also be noted that the provision of transportation for each young man's visit to Las Vegas for the administration of this test is acknowledged by the University and is set forth in Part I-J-1 of this report.

The University has asserted that this finding, if upheld by the Council, would not represent a violation of NCAA Bylaw 1-1-(a) [improper inducements]. In this regard, the Committee notes that both the Council and

the Committee have found in past cases that arrangements to credit prospective student-athletes with improperly achieved scores on precollege enrollment tests have been considered improper inducements to encourage the prospective student-athletes to enroll in the involved institutions. In fact, without such assistance the prospects in question probably would not have qualified for athletically related financial aid, practice and play during their freshman years in residence and likely would have attended different collegiate institutions. Examples of previous cases involving similar findings are California State University, Long Beach; McNeese State University, and the University of Southwestern Louisiana.

H. Violations of the provisions governing recruiting [NCAA Bylaw 1-1-(a)].

1. In April 1971, in an effort to encourage the enrollment of prospective student-athlete Chad Meyer, Lodi, California, then head basketball coach John Bayer promised the young man that he would arrange for Meyer to purchase a new automobile at a cost of approximately $400-$500 during his attendance at the University.

2. During the 1970-71 academic year, while recruiting prospective student-athlete Chad Meyer, Lodi, California, then head basketball coach John Bayer promised to arrange for the young man's parents to be provided

air transportation to Las Vegas at no cost to the Meyers in order to attend basketball games in which their son would be participating as a member of the University's intercollegiate basketball team; further, Bayer promised to arrange cost-free lodging in Las Vegas for the young man's parents during these trips.

3. In April 1971, then head basketball coach John Bayer arranged for a representative of the University's athletic interests, who was a member of the dental profession in Las Vegas, to promise then prospective student-athlete Chad Meyer, Lodi, California, and his mother that the young man would receive cost-free dental care during his attendance at the University.

*4. In April 1971, during the official paid visit to the University's campus of prospective student-athlete Maurice Presley, Houston, Texas, then head basketball coach John Bayer promised to arrange for Presley to be given a new automobile during his attendance at the University.

The Committee's finding is based upon information reported to the NCAA on March 1 and 2, 1973, during separate interviews with Maurice Presley, Presley's father and Walter Yates, the young man's former high school basketball coach. The Committee believes the Council should note that all three indi-

viduals were present when this offer was made and each reported similar details related to the promise by Bayer. In this regard, each individual (Presley, his father and Yates) identified the same location (i.e., a Las Vegas automobile agency) where the offer was made by Bayer. In addition, it should be noted that during the time in question, Bayer was involved in the offer of various improper inducements to other prospective student-athletes (reference: Parts I-H-1, 2, 3 and 5 of this report) which are not the subject of appeal by the University in this case.

The University's appeal of this finding is based on information developed in its interviews with Presley, his father, Yates and Bayer. The Committee has considered this conflicting information and accepts the original statements of Presley, his father and Yates on the basis that these individuals would have no reason or opportunity to report the alleged violation in detail in separate interviews if, in fact, no offer had been made by Bayer. In addition, the Committee again directs the Council's attention to Part IV-C of this report.

5. In April 1971, in an effort to encourage the enrollment of prospective student-athlete Ed McPheters, Stockton, California, then head basketball coach John Bayer promised McPheters that he would arrange for the young man to receive the following benefits during

his attendance at the University: (a) a sum of money; (b) a new wardrobe, and (c) a new Camaro automobile.

*6. During the 1973-74 academic year, Harvey J. Munford, a representative of the University's athletic interests, cosigned a note at the Mediterranean Furniture Company in Las Vegas in order for prospective student-athlete David Vaughn to purchase furniture at a cost of approximately $600; further, Munford eventually paid approximately $400 from his own personal funds to retire the note.

The Committee's finding is based on information initially reported by Harvey Munford to the NCAA on October 8, 1975, and confirmed by Munford in his interview with the University. However, it is the University's position that although Munford did sign the note in question, he should not be considered a representative of the institution's athletic interests.

The Committee believes Munford is a representative of the University's athletic interests for the following reasons: (a) Munford was a part-time employee at the University and reported to the NCAA that he has been closely associated with members of the University's coaching staff for several years; (b) Munford reported that he has assisted the University in recruiting, including during the 1973-74 academic year, when

he was requested by Jerry Tarkanian to assist in the recruitment of prospective student-athlete David Vaughn at the time the young man made his official paid visit to the University's campus; (c) Munford reported that through the encouragement of Jerry Tarkanian and assistant basketball coach Tony Morocco, he occasionally contacted prospective student-athlete David Vaughn and his wife for recruiting purposes during the 1973-74 academic year, and (d) if the Council accepts the Committee's finding as set forth in Part I-H-7 of this report, Tarkanian requested Munford to assist prospective student-athlete David Vaughn as described therein.

Although Munford acknowledges cosigning the note in question, the University also asserts that Munford signed this note in an effort to encourage Vaughn to participate in an AAU basketball tournament. The Committee notes that even if this was the case, which the Committee does not believe, it would not be permissible for a representative of the University's athletic interests to cosign such a note for a prospective student-athlete. Further, the Committee believes Munford signed this note because he was encouraged to do so by a member of the University's basketball coaching staff as reported initially by Munford to the NCAA on October 8, 1975, and again on November 9, 1976. The Committee notes that Munford

has been contacted on several occasions by the NCAA, and that Munford first identified Jerry Tarkanian and then assistant basketball coach Tony Morocco as the individuals encouraging him to cosign this note. The Committee believes Munford's present claim that none of the University's coaches encouraged him to cosign the note, as reported during his interviews with the University, represents an attempt by Munford to remove himself from involvement in this case. The Committee believes Munford initially provided accurate information to the NCAA and again directs the Council's attention to Part IV-C of this report for additional information in this regard.

*7. During the 1973-74 academic year, head basketball coach Jerry Tarkanian arranged for Harvey J. Munford, a representative of the University's athletic interests and a part-time instructor at the University, to provide prospective student-athlete David Vaughn a "B" grade in a course taught by Munford at the University (The Role of Black Development in America) with the understanding that Vaughn would not attend any classes or do any course work.

The Committee's finding is based upon information initially reported to the NCAA by Harvey Munford on October 8, 1975, and confirmed in an interview with the NCAA on February 27, 1976. It should be noted

that when contacted during the University's review of this matter, Munford denied reporting this information to the NCAA. In this regard, the Committee notes that prior to Munford's October 8, 1975, interview, the NCAA was not in possession of specific information concerning Munford's relationship with prospective student-athlete David Vaughn or the young man's enrollment in the class identified in this finding. However, when Vaughn's University of Nevada, Las Vegas, transcript was obtained subsequent to this initial interview, the transcript corroborated information provided by Munford to the extent that Vaughn, in fact, had been enrolled in the class identified in this finding, and had been credited with a "B" grade.

The Committee believes it unlikely that Munford would have initially provided the specific detailed information set forth in this finding, if the information was not accurate. Also, the Committee notes that although on February 27, 1976, Munford confirmed this information to the NCAA, he also reported that when faced with the prospect of being interviewed by officials of the University of Nevada, Las Vegas, he was not certain whether in that situation he would tell the truth concerning the improper grade, or might find it necessary to furnish false information indicating that Vaughn actually attended the class, thus leaving the Committee on Infractions in the position of attempting to determine what information was accurate.

Throughout consideration of this matter by the Committee, it has been the position of the University and Munford (as well as his legal counsel) that Munford did not report the information set forth in this finding to the NCAA. Munford also has denied to the University that he provided an improper grade to Vaughn as described. After careful consideration of this conflicting information, the Committee believes Munford did, in fact, provide this information to the NCAA and is now attempting to remove himself from involvement in this case. For additional information in this regard, the Committee again directs the Council's attention to Part IV-C of this report.

I. Violation of the provisions governing recruiting [NCAA Bylaws 1-1-(a) and 1-3].

*1. For an approximate one-month period during the University's "mini semester" conducted between terms in the 1973-74 academic year, prospective student-athlete David Vaughn was permitted to participate on various occasions in the University's organized basketball squad practice sessions although Vaughn had not been officially accepted for admission to the institution.

Both the University and the NCAA agree that prospective student-athlete David Vaughn

participated in organized basketball squad practice sessions during the University's one-month "mini semester" conducted between terms in the 1973-74 academic year. The basis for the Committee's finding is that a "mini semester" is not considered to be a regular term for purposes of applying NCAA legislation and, therefore, Vaughn was a prospective student-athlete (rather than a regularly enrolled student-athlete) at the time of his participation in the practice sessions; further, Vaughn was never officially accepted for admission as a regular student to the University as required by NCAA Bylaw 1-3-O.I. 110, in order to participate in organized practice sessions. Therefore, Vaughn should not have been permitted to participate in the University's organized basketball practice sessions between regular terms of the University's academic year.

In past infractions cases, both the Council and the Committee have found that the improper participation of prospective student-athletes in athletic tests or practice sessions constitutes a violation of NCAA Bylaw 1-1-(a) [improper inducements] and Bylaw 1-3 (tryouts), inasmuch as such participation may encourage a prospective student-athlete, to enroll in the institution, as well as violate the tryout rule. Examples of past cases involving such findings are California State University, Long Beach; North Carolina State University, and the University of Minnesota.

J. Violation of the provisions governing recruiting [NCAA Bylaws 1-1-(a), 1-5-(a) and 1-5-(c)].

1. Through the arrangements of then head basketball coach John Bayer, prospective student-athletes James Baker, Philadelphia, Pennsylvania; Dan Cunningham, Salinas, California; Eddie Taylor, Philadelphia, Pennsylvania, and Don Weimer, Chula Vista, California, were provided two paid visits to the University's campus at the expense of the University. Specifically, Bayer arranged for each young man to be provided an initial visit at the University's expense during the 1970-71 academic year, and arranged for the young men to receive round-trip transportation at no cost to them between their homes and Las Vegas in conjunction with a second visit during the summer following the 1970-71 academic year.

K. Violation of the provisions governing recruiting [NCAA Bylaws 1-1-(a) and 1-5-(b)].

*1. During April 1973, Rodney Parker, a representative of the University's athletic interests, provided $10 cash to Steve Masterson, a friend of prospective student-athlete Rudy Jackson, in order to reimburse Masterson for expenses incurred in transporting Jackson and prospective student-athlete Tico Wynder via automobile from Hutchinson to Wichita, Kansas (approximately 40 miles one way), to meet with Parker.

The University and the NCAA agree that the transaction described in this finding occurred, and that the transaction occurred the day before Parker accompanied Jackson to Las Vegas for the young man's official paid visit to the University's campus. However, it is the University's position that Parker should not be considered a representative of the institution's athletic interests.

The Committee believes Rodney Parker is a representative of the University's athletic interests for the following reasons: (a) Parker initially reported to the NCAA on May 15, 1974, that Jerry Tarkanian had requested that Parker assist the University of Nevada, Las Vegas, in recruiting Rudy Jackson; further, that Tarkanian's request was made during a conversation at a high school all-star game prior to the time Parker became involved in the transaction set forth in this finding; (b) Parker initially reported to the NCAA that Brad Welch, a representative of the University's athletic interests, arranged for Parker to accompany Rudy Jackson at the time the young man made his official paid visit to the University of Nevada, Las Vegas; (c) prospective student-athletes Tico Wynder and Rudy Jackson have reported to the NCAA that Parker telephoned Jackson to make the arrangements for the young man's official paid visit to the University, and (d) based upon the information developed by the NCAA staff in this case, as well as information developed concerning Jackson's recruitment in a previous infractions case involving another NCAA member institution, it appears that Parker was not involved in Jackson's recruitment by any other collegiate institution.

The Committee has considered information reported by Rodney Parker to the University indicating that Parker merely attempts to assist various prospective student-athletes during the course of their recruitment and should not be considered as a representative of any one institution's athletic interests in terms of Jackson's, or any other prospective student-athlete's, recruitment. In this regard, the Committee believes the Council should note that regardless of the purpose Parker envisions for his involvement in a prospective student-athlete's recruitment, the fact remains that under NCAA legislation if a member institution's staff member requests or has knowledge of Parker's assistance in the recruitment of a prospect for that institution, then Parker must be considered a representative of that institution's athletic interests.

The Committee also notes that Parker now takes the position that his involvement in the University's recruitment of Jackson occurred on his (Parker's) own initiative, and that he has never reported information to the NCAA indicating that Tarkanian and

Welch requested his assistance. After considering this information, it is the Committee's belief that Parker has reported false information to the University in an attempt to remove himself from involvement in this case and has disclaimed the information he originally provided the NCAA accordingly. For additional information related to the Committee's position in this regard, the Council's attention is again directed to Parts IV-C and IV-E of this report.

L. Violation of the provisions governing recruiting [NCAA Bylaws 1-1-(a) and 1-5-(e)].

1. In April 1971, then head basketball coach John Bayer arranged for John Presley, the father of prospective student-athlete Maurice Presley, Houston, Texas, to be provided round-trip transportation at no cost to him between Houston and Las Vegas, Nevada, in conjunction with his son's official paid visit to the University's campus.

M. Violation of the provisions governing recruiting [NCAA Bylaws 1-1-(a), 1-5-(e), 1-5-(e)-(3), 1-5-(f) and 1-5-(i)].

•1. During April 1973, head basketball coach Jerry Tarkanian and Brad Welch, a representative of the University's athletic interests, arranged for Rodney Parker, another representative of the University's athletic interests, to accompany prospective student-athletes Rudy Jackson and Tico Wynder on their official paid visits to the University's

campus at no expense to Parker. Specifically, through the arrangements of Tarkanian and/or Welch, Parker accompanied the young men on a commercial airline flight from Wichita, Kansas, to Las Vegas; further, Tarkanian and/or Welch arranged for Parker to be provided lodging at the Dunes Hotel, and meals and entertainment in Las Vegas during the official paid visits of the young men at no expense to Parker; further, for approximately two days after the prospects returned home, Parker was permitted to remain in Las Vegas while continuing to receive lodging, meals and entertainment at no expense to him; finally, Welch gave Parker approximately $300 cash in order to reimburse Parker for his travel expenses to Las Vegas from Wichita, and to pay the cost of one-way commercial airline transportation between Las Vegas and New York.

The University and the NCAA are in agreement that Rodney Parker accompanied prospective student-athletes Rudy Jackson and Tico Wynder on their official paid visits to the University's campus; further, that Parker was provided lodging at the Dunes Hotel, meals and entertainment in Las Vegas at no personal expense; finally, that for approximately two days after the prospects in question returned home, Parker remained in Las Vegas while continuing to receive lodging, meals and entertainment at no personal ex-

pense. However, the University denies that Parker received approximately $300 cash from Brad Welch as reimbursement for his travel expenses on this occasion, that Welch or Jerry Tarkanian were involved in any of the arrangements for the lodging, meals and entertainment provided Parker on this occasion, or that Parker is a representative of the University's athletic interests.

The Committee's finding is based on information reported to the NCAA by Parker, who described the arrangements for his transportation, lodging, meals and entertainment on this occasion as set forth in the statement of the finding. The Committee believes the Council should note that Parker specifically identified Welch as the individual who made these arrangements; further, Parker indicated that Jerry Tarkanian had previously requested his (Parker's) assistance in the recruitment of one of the prospective student-athletes Parker accompanied on this visit. In addition, Parker initially reported to the NCAA that he was provided approximately $300 cash by Welch as reimbursement for his personal expenses.

The Committee has considered the information reported by Parker to the University indicating that an individual with no relationship to the institution's athletic interests made the arrangements for the lodging, meals and entertainment in question; further, that Parker paid for his own transportation ex-

penses. It is the Committee's belief that Parker has altered the information he initially provided the NCAA, and which he now claims he never provided the NCAA, in order to remove himself from involvement in this case. For additional information in this regard, the Committee again directs the Council's attention to Parts IV-C and IV-E of this report. Finally, the Committee believes that Parker should be considered a representative of the University's athletic interests for the reasons set forth as the basis for its finding in Part I-K-1 of this report.

N. Violation of the provisions governing recruiting [NCAA Bylaws 1-1-(a) and 1-5-(f)].

*1. Beginning in the 1970-71 academic year and continuing until the present time, prospective student-athletes making their official visits to the University's campus have been lodged in local, luxury hotels in Las Vegas which provide facilities which are not on a scale comparable to that of normal student life on campus, in that minimum regular rates of approximately $30 per day are charged; further, prior to the fall, 1973-74 academic year, prospective student-athletes were escorted to or permitted to attend dinner shows and other live entertainment at these and similar luxury hotels at no cost to them, resulting in the payment or provision of excessive entertainment for these young men, in that normal admission prices of approx-

imately $22 per person for a dinner show and approximately $15 per person for a late-night show were charged at these hotels.

It is the Committee's position that the Las Vegas luxury hotels located primarily on the Las Vegas "strip" provide facilities which are not on a scale comparable to that of the normal student life on the University's campus as required by NCAA Bylaw 1-5-(f). The University has submitted information indicating that it utilizes the facilities of these hotels because they are near the University's campus and offer rates comparable to chain motels such as Holiday Inn, Howard Johnson's and Travel Lodge.

Although the University has reported information indicating that it is able to secure lodging for prospective student-athletes at luxury hotels for costs comparable to the rates charged at chain motels, the Committee notes that the critical factor in terms of compliance with NCAA regulations governing the lodging of prospective student-athletes is not the cost charged the University, but whether the facilities available at these luxury hotels are comparable to facilities available on campus. In this regard, the Committee also notes that luxury hotels could provide lodging and entertainment for a prospective student-athlete at no charge to a member institution, and the provision of such lodging and entertainment would still be contrary to

NCAA recruiting regulations, inasmuch as these regulations relate to benefits provided the prospective student-athlete, rather than the cost of such benefits to the institution. Similar findings have been made on this basis in previous infractions cases, including West Texas State University and the University of Minnesota.

It should be noted that beginning in the fall of the 1973-74 academic year, the University has limited the entertainment of prospective student-athletes housed at these luxury hotels. However, prior to the fall of the 1973-74 academic year, prospective student-athletes were entertained at dinner shows and performances at these luxury hotels at no personal expense resulting, in the Committee's opinion, in excessive entertainment for these prospects under the requirements of Bylaw 1-5-(f). The Committee believes the fact that the University, on its own initiative, curtailed such entertainment of prospective student-athletes at these hotels is supportive of the Committee's position.

*2. In April 1973, during the official paid visit of prospective student-athlete Eddie Owens, Houston, Texas, then assistant basketball coach Tony Morocco provided an automobile to the young man for his personal use for an evening at no cost to Owens.

The Committee's finding is based upon information reported to the NCAA by Eddie

Owens on May 29, 1973. It should be noted that this interview was conducted prior to Owens' initial enrollment in the University, approximately two months after the incident in question. The University has submitted information obtained from Owens in May 1976 indicating that the information he originally provided the NCAA is incorrect. Further, the University is unable to identify the owner of an automobile similar to the one originally described by Owens.

It is the Committee's position that Owens did report accurate information during his initial interview with the NCAA, inasmuch as he described in detail the arrangements by Morocco to provide him the use of an automobile shortly after the incident occurred; further, the Committee believes that at the time of this original interview, Owens had no reason to provide false information to the NCAA. The Committee does not believe it would be necessary to identify the owner of this automobile in order to establish that a violation occurred in this instance. The fact that assistant basketball coach Tony Morocco made this automobile available to Owens, regardless of the identity of the automobile's owner, is clearly contrary to the provisions of Bylaws 1-1-(a) and 1-5-(f).

The University has submitted information indicating that it does not believe that this finding constitutes a violation of NCAA Bylaw 1-1-(a) [improper inducement]. In this

regard, the Committee notes that the offer or provision of any financial aid or equivalent inducement (e.g., the use of an automobile) not otherwise permitted by NCAA legislation in the recruitment of prospective student-athletes has been considered by both the Committee and Council in past infractions cases to constitute an improper inducement. Examples of the application of this legislation to similar situations can be found by the Council in numerous past infractions cases involving violations of NCAA recruiting regulations.

*3. During April 1973, while recruiting prospective student-athletes Rudy Jackson and Tico Wynder, Hutchinson, Kansas, Rodney Parker, a representative of the University's athletic interests, paid the expenses for one night's lodging and a meal for the young men at the Diamond Inn Motel in Wichita, Kansas.

The University and the NCAA agree that the facts set forth in this finding occurred as described, and that these events occurred the day before Rodney Parker accompanied Jackson and Wynder to Las Vegas for the young men's official paid visits to the University's campus. However, as previously noted, it is the University's position that Parker should not be considered a representative of the institution's athletic interests.

In this regard, the Committee directs the Council's attention to the information set

forth in Part I-K-1 of this report as it relates to the description of Parker's relationship to the University's athletic interests in this case. For additional information concerning the Committee's position in regard to information provided the University by Parker, the Council's attention is again directed to Parts IV-C and IV-G of this report.

O. Violations of the provisions governing recruiting [NCAA Bylaws 1-1-(a) and 1-6(a)].

1. In April 1971, in an effort to encourage the enrollment of prospective student-athlete Dan Cunningham, then head basketball coach John Bayer promised the young man and his parents that Cunningham would receive a full athletic grant-in-aid at the University for a period of five years.

*2. Prior to the beginning of classes for the 1973-74 academic year, head basketball coach Jerry Tarkanian arranged for prospective student-athlete Robert "Jeep" Kelley to be provided the benefit of one-way commercial airline transportation at no expense to Kelley to travel between his home in Pittsburgh, Pennsylvania, and Las Vegas, Nevada, for the purpose of enrolling in and attending classes at the University during that academic year; further, upon arriving in Las Vegas during the summer, Tarkanian arranged for Kelley to be lodged for approximately one month, at no expense to Kelley, with student-athlete Ricky Sobers at the

Sierra Vista Apartments in Las Vegas, Nevada.

The Committee's finding is based upon information reported to the NCAA by Robert Kelley on May 15, 1975. Kelley stated that he received the benefits as described through the arrangements of Tarkanian as found by the Committee.

The University's appeal is based primarily on information developed during its interviews with Kelley. As previously noted, the Committee believes that after Kelley provided information to the NCAA related to this and other findings, he was improperly encouraged and pressured to provide the University false information. In this regard, the Committee again directs the Council's attention to Parts I-F-1, IV-C and IV-E of this report.

3. During the 1973-74 academic year, assistant basketball coach Tony Morocco arranged for his nephew, Tom Morocco, to pay (with cash provided by Tony Morocco) the cost to rent a U-Haul trailer utilized to move the household goods of prospective student-athlete David Vaughn from his home in Tulsa, Oklahoma, to Las Vegas, Nevada (approximately 1000 miles), as well as the costs incurred by Morocco and Vaughn for gasoline, room and board during the trip.

4. During the 1973-74 academic year, assistant basketball coach Tony Morocco arranged for

Bill Dougherty (who was residing in the Morocco home in Las Vegas at the time) to transport prospective student-athlete David Vaughn, Tulsa, Oklahoma, in Vaughn's automobile from Flagstaff, Arizona, to Las Vegas (approximately 150 miles) at no cost to Vaughn.

P. Questionable practice in light of NCAA requirements [NCAA Bylaw 4-6-(d)].

1. At a time when certain practices of the University's intercollegiate basketball program were not in compliance with NCAA legislation, the chief executive officer of the University, Donald H. Baepler, based upon information provided by athletic department staff members and without intent to do so, erroneously certified on May 21, 1974, the University's compliance with NCAA legislation.

Q. Violation of the provisions governing certification of compliance with NCAA legislation [NCAA Bylaw 4-6-(d)].

*1. With full knowledge at the time that certain practices of the University's intercollegiate basketball program were not in compliance with NCAA legislation, head basketball coach Jerry Tarkanian failed to report to University officials during an institutional review conducted in conjunction with the University's May 21, 1974, certification of compliance with NCAA legislation, his knowledge of and involvement in any violations of NCAA legislation.

The Committee's findings set forth in Parts I-A-2, I-A-3, I-C-6, I-H-7, I-M-1 and I-O-2 of this report relate to Jerry Tarkanian's involvement in events which occurred prior to the University's May 21, 1974, certification of compliance with NCAA legislation. If any of these findings are upheld by the Council, the Committee believes this finding (I-Q-1) to be supported without need for further explanation or justification, other than to note that Tarkanian failed to report his knowledge of or involvement in the violation(s) upheld by the Council.

R. Questionable practice in light of NCAA requirements [NCAA Bylaws 4-6-(d) and 4-6-(d)-(4)].

*1. At a time when certain practices of the University's intercollegiate basketball program were not in compliance with NCAA legislation, head basketball coach Jerry Tarkanian attested to the chief executive officer of the University on a statement filed in conjunction with the University's June 25, 1975, certification of compliance with NCAA regulations, that he had reported his knowledge of and involvement in any violations of NCAA legislation involving the institution.

It should be noted that the Committee did not find a violation in regard to this certification. However, if the Council upholds any of the Committee's findings set forth in Parts I-A-3, I-A-5, I-C-5 and I-C-8 of this

report, it is the Committee's position that head basketball coach Jerry Tarkanian was in a position to know, if in fact he did not know, that these violations had occurred and should have been reported at the time he signed the staff certification statement associated with the University's June 25, 1975, certification of compliance with NCAA legislation.

II. Penalty to be imposed upon institution, as proposed by Committee.

[NOTE: Each penalty appealed by the University of Nevada, Las Vegas, is identified by an asterisk (*). The primary reasons for the Committee on Infractions' proposed penalties are set forth at the conclusion of this section and are separated by a line.]

*A. The University of Nevada, Las Vegas, shall be publicly reprimanded and censured, and placed on probation for a period of two years from the date this penalty is imposed, which shall be the date established by NCAA Council action as a result of an appeal by the University to the Council, it being understood that should any of the penalties in this case be set aside for any reason other than by appropriate action of the Association, the penalty shall be reconsidered by the NCAA; further, prior to the expiration of this period of probation, the NCAA shall review the athletic policies and practices of the University.

*B. During the probationary period, the University's intercollegiate basketball team shall end its seasons with the playing of its last, regularly scheduled inseason contest and the University shall not be eligible to participate in the National Collegiate Basketball Championship or any other postseason basketball competition.

*C. During the probationary period, the University's intercollegiate basketball team shall not be eligible to appear on any television series or program subject to the administration or control of this Association, and the institution shall not make any commitments for such appearances prior to the University being restored to full rights and privileges of NCAA membership.

*D. During the 1978-79 academic year, no more than three student-athletes in the sport of basketball shall receive initial, athletically related financial aid (as set forth in O.I. 500) which has been arranged for or awarded by the University of Nevada, Las Vegas, regardless of the time such aid becomes countable under the requirements of NCAA Bylaw 5.

*E. During the 1979-80 academic year, no more than three student-athletes in the sport of basketball shall receive initial, athletically related financial aid (as set forth in O.I. 500) which has been arranged for or awarded by the University of Nevada, Las Vegas, regardless of the time such aid becomes countable under the requirements of NCAA Bylaw 5.

[NOTE: In the event no more than three student-athletes in the sport of basketball are permitted to receive initial, athletically related financial aid (as

set forth in O.I. 500) during the 1977-78 academic year, regardless of the time such aid is countable under the requirements of NCAA Bylaw 5, this is notification that the penalties set forth in Parts II-D and E above shall be applied to the 1977-78 and 1978-79 academic years respectively.]

F. The Committee on Infractions requests the University of Nevada, Las Vegas, to show cause, in accordance with Section 7-(a)-(12)-(i) of the Official Procedure Governing the NCAA Enforcement Program, pages 119-120, 1976-77 NCAA MANUAL, why additional penalties should not be imposed upon the University if it does not take appropriate disciplinary and corrective action with regard to:

1. Former assistant basketball coach Fred Albrecht which, in the Committee's present view, should be complete severance of any and all relations Albrecht may have, formally or informally, with the University's intercollegiate basketball program during the probationary period including, but not limited to, his financial support, recruiting efforts and membership in institutional basketball booster groups.

2. Former head basketball coach John Bayer which, in the Committee's present view, should be complete and permanent severance of any and all relations Bayer may have, formally or informally, with the University's intercollegiate athletic program including, but not limited to, his financial support, recruiting efforts and membership in institutional athletic booster groups.

3. Ann Cohen, Burrell Cohen, Richard Davis, Frank Denton, Howard Kincaid, Sam Krug, Harvey Munford, Rodney Parker, Art Thomas and Brad Welch, representatives of the University's athletic interests, which, in the Committee's present view, should be complete and permanent severance of any and all relations these individuals may have, formally or informally, with the University's intercollegiate athletic program including, but not limited to, their financial support, recruiting efforts and membership in institutional athletic booster groups.

[NOTE: The names of Sam Krug and Art Thomas should be deleted from this show cause requirement inasmuch as the Committee has withdrawn its finding (Part I-C-3 of this report) involving these individuals.]

4. Head basketball coach Jerry Tarkanian which, in the Committee's present view, should be complete severance of any and all relations Tarkanian may have, formally or informally, with the University's intercollegiate athletic program during the period of the University's probation including, but not limited to, activities associated with administration, supervision, coaching, recruiting, athletic booster groups and public relations or fund-raising activities related to the University's athletic program.

[NOTE: Your attention is directed to Section 7-(a)-(12) of the Official Procedure Governing the NCAA Enforcement Program, page 120, 1976-77 NCAA MANUAL. Inasmuch as the University has appealed the findings of violations set forth in this report involving each of the individuals identified in Parts II-F-1 through 4 of the proposed penalty in this case, the Committee on Infractions' show cause requirement described in Part II-F will not be in effect in regard to the individuals identified in the appropriate findings, until the NCAA Council has acted upon the University's appeal. If the Council arrives at a conclusion in regard to an appealed finding which substantially sustains the Committee on Infractions' finding of violation involving the individual in question, the 15-day period of the show cause requirement set forth in Section 7-(a)-(12) shall begin with the date of receipt by the University of written notification of the Council's action. If the Council substantially alters the Committee's finding of violation involving the individual, the Committee will reconsider the show cause requirement involving the individual and the University will be notified of the Committee's conclusion.

The University's attention is directed to page 120 of the 1976-77 NCAA MANUAL where the show cause procedures are clearly described, including the responsibility of the institution to provide due notice and hearing to the involved individual before taking any disciplinary or corrective action. Also, information set forth on page 120 describes the responsibilities of the institution in regard to written notification to the NCAA within the appropriate

15-day period applicable to the show cause requirement. Also, note that the determination of whether the actions taken by the University are appropriate with regard to this show cause requirement shall be solely that of the Committee on Infractions.]

[NOTE: When such penalties and corrective actions as are determined by the Council become effective, the University should take every precaution to insure that the terms of the penalties and corrective actions are observed. Further, the Committee on Infractions intends to monitor the penalties and corrective actions during their effective periods, and any action contrary to their terms shall be considered grounds for extending their provisions and the University's probationary period.]

The University has appealed the penalties identified in this report, based primarily on the contention that for the most part the serious violations in this case did not occur; further, the University has cited additional reasons set forth in President Baepler's May 13, 1977, letter appealing the proposed penalties. If the Council upholds for the most part the appealed findings, the Committee believes the proposed penalties are fully justified. However, the Committee also submits the following paragraphs which include several of the primary factors considered in arriving at the penalties and serve to respond to the specific reasons cited by the University for its appeal

1. It should be noted that the findings of the Committee in this case include violations of various sections of the NCAA Constitution and Bylaws

related to improper aid and extra benefits to prospective and enrolled student-athletes, institutional control and responsibility, ethical conduct, recruiting, institutional eligibility for championship events, certification of compliance with NCAA legislation, and the cooperative principle of the NCAA enforcement program. Specifically, the Committee found violations of NCAA Constitution 3-1-(g)-(5), 3-1-(g)-(6), 3-2, 3-4-(a), 3-6-(a) and 3-9-(e), and Bylaws 1-1-(a), 1-3, 1-5-(a), 1-5-(b), 1-5-(c), 1-5-(e), 1-5-(e)-(3), 1-5-(f), 1-5-(i), 1-6-(a), 4-6-(b), 4-6-(d) and 7-5-(d), and the opening statement of the Official Procedure Governing the NCAA Enforcement Program. In addition, the Committee found questionable practices related to the University's certification of compliance with NCAA legislation under the provisions of Bylaws 4-6-(d) and 4-6-(d)-(4). In the event the Council upholds for the most part the Committee's findings, it should be noted the Committee believes these numerous, varied and serious violations were not the result of inadvertent actions or ignorance of NCAA rules; rather, the Committee believes this case demonstrates a disregard for the governing legislation on the part of certain University staff members and athletic representatives, and, therefore, the proposed penalties in this case are fully justified.

2. The University has appealed the proposed penalties in this case in part on the basis that the University has not been involved in a previous infractions case. It should be noted that in determining the proposed penalties in any infractions case, the Committee considers the institution's previous record of involvement in such cases. Specifically, the provisions of Section 7-(a) of the Official Procedure Governing the NCAA Enforcement Program state in part that "previous violations of NCAA legislation shall be a contributing factor in determining the degree of penalty."

Accordingly, had the University been involved in a previous infractions case, the proposed penalties in this case would have been substantially more severe. On the other hand, the Committee believes the University's past record would not be reason to further or completely relieve the institution of its responsibility for the violations found by the Committee in this case.

3. The University has appealed the Committee's proposed penalties based in part upon disciplinary and corrective actions already taken by the University. Based upon information presented by the University to date, the Committee is not aware of any disciplinary action which has been taken by the University as a result of violations in this case. In regard to corrective actions cited by the University, the institution contends that its decision to dismiss former head basketball coach John Bayer in the spring 1973 was based upon his "care-free attitude about possible NCAA penalties being imposed against the institution." In this regard, it should be noted that this action concerning Bayer was not based on any findings by the University that he actually was involved in violations of NCAA legislation.

Based upon its findings in this case, the Committee does not believe the University's selection of head basketball coach Jerry Tarkanian as Bayer's replacement represents a meaningful solution to the concerns expressed by the institution in the spring 1973. In the event the Council accepts the Committee's finding as set forth in Part I-M-1 of this report, it should be noted that Tarkanian was involved in a violation of NCAA legislation approximately two weeks after the date he began employment with the University. Further, Brad Welch, a representative of the University's athletic interests who has been identified as a principal spokesman for the institution in encouraging Tarkanian to accept employment with the University, is also identified in the finding set forth in Part I-M-1 of this report. Additional findings by the Committee involving Tarkanian are set forth in Parts I-A-2, I-A-3, I-C-6, I-E-1, I-F-1, I-H-7, I-O-2, I-Q-1 and I-R-1 of this report.

It should also be noted that at the time Tarkanian was hired, he was a principal in an infractions case under consideration by the Committee involving California State University, Long Beach. Although the processing of this case was confidential under NCAA requirements, no information has been presented to the Committee to indicate that the University of Nevada, Las Vegas, contacted officials of California State University, Long Beach, to obtain any information related to Tarkanian's past performance at the time the decision was made to employ him as Bayer's replacement.

In summary, based upon all available information, the Committee does not accept the University's contention that Tarkanian was, in fact, more willing to abide by NCAA legislation than his predecessor. To the contrary, the Committee believes the University's assertion of its good intions in replacing Bayer with Tarkanian is not supported by the information in this case. Accordingly, the Committee does not believe the University's action in this instance warrants consideration as a mitigating factor in this case.

The University also contends that various personnel changes involving the former president of the University and the former director of athletics, as well as a general reorganization of the athletic department, should be considered as mitigating factors. The Committee does not believe that this information is significant in consideration of a penalty in this case, inasmuch as no information has been submitted to support a conclusion that these actions resulted from findings of actual violations of NCAA regulations. Rather, the available information indicates the actions in question were based upon a general lack of interest in the control of the University's athletic program on the part of the individuals who were replaced.

4. The University has appealed the Committee's proposed penalties based in part upon the lengthy investigation of this case by the NCAA enforcement staff, as well as the consequences of publicity surrounding the investigation. The Committee does not believe either the length of the

investigation by the NCAA or the publicity related to this case has had any appreciable effect upon the University's athletic program. In this regard, the won/loss records of the University's intercollegiate basketball team for the past five years are: 1972-73, 14-14; 1973-74, 20-6; 1974-75, 24-5; 1975-76, 29-2, and 1976-77, 29-3; further, the University has participated in the National Collegiate Basketball Championships during the 1974-75, 1975-76 and 1976-77 academic years and finished as the third-place team in the 1976-77 National Collegiate Basketball Championship; further, the University has reported that based in part on the success of its intercollegiate basketball team during this period, financial contributions by supporters of the University have substantially increased.

5. The University has appealed the Committee's proposed penalties in this case based in part upon the time differential between the dates the violations occurred as found by the Committee and the date the proposed penalties would be imposed. In this regard, it should be noted that the violations of NCAA legislation found by the Committee in this case occurred during a period beginning in April 1971 and ending with the conclusion of the 1974-75 academic year. Among the reasons for the resultant time differential are: (a) the NCAA's investigation of this case was not sufficiently complete to draft an initial official inquiry to be submitted to the University until January 1976; (b) subsequent to receipt of the official inquiry in February 1976 and a supplement in June 1976, the University found it necessary to request two delays in forwarding its response to the Committee in order to complete its review of each allegation, and the University's response was not received until October 29, 1976; (c) although the University initially appeared before the Committee on November 14, 1976, due to the length of time expended in discussing the various allegations, the Committee and the University found it necessary to meet again on December 13 and 14, 1976, as well as on March 13, 1977, in order to conclude the Committee's hearing of this case, and (d) subsequent to receipt of the Committee's April 26, 1977, confidential report, the University initiated this appeal resulting in the NCAA Council's consideration of this case on August 22, 1977. Obviously, the period of time necessary for the University to conduct its review of these allegations, appear before the Committee on Infractions, and utilize its appeal opportunity before the Council has contributed significantly to the time differential between the violations in this case and penalty imposed.

In regard to Item (a) above, although the NCAA's investigation extended through January 1976, it should be noted that this investigation not only involved information which was included in official inquiries to the University (related to alleged violations occurring throughout the identified period, including the 1974-75 academic year), but also involved information which did not result in the submission of allegations to the Uni-

versity. Subsequent to the completion of this investigation, a period exceeding one and one-half years (January 1976 - August 1977) has elapsed while the University reviewed the allegations, prepared its response to the official inquiry, and appeared in hearings before the Committee and the Council. Although the Committee is concerned with the length of time necessary to process major infractions cases, it believes that the procedures adopted by the NCAA membership and implemented by the Council and Committee on Infractions are necessary to insure that the interests of the NCAA membership, the involved institution and all involved individuals are adequately protected. Further, in the Committee's judgment the time expended to protect these interests in this case should not be considered by the Council as a basis for reducing the proposed penalties.

6. The University has appealed the Committee's findings in part on the basis of the effect they will have upon students and University personnel unassociated with the infractions. Based upon the violations of the Association's governing legislation which have been found by the Committee in this case, it is apparent to the Committee that certain members of the University's basketball coaching staff, as well as certain representatives of the University's athletic interests, violated NCAA legislation in a manner which reflects a lack of proper institutional control. As the Council is aware, the NCAA is an association of member institutions, and it is a fundamental principle of this Association that the control and

responsibility for the conduct of intercollegiate athletics must be exercised by the institution itself. Further, under the provisions of Section 7-(a) of the Official Procedure Governing the NCAA Enforcement Program, "the NCAA penalty should be broad and severe if the violation or violations reflect a general disregard for the governing rules." The Committee believes the penalties proposed in this case as set forth in Parts II-A through E of this report are consistent with this directive and are designed to insure that the University assumes appropriate institutional responsibility for the conduct of its intercollegiate athletic program.

In addition, noting the Council's position that the penalties in infractions cases should also relate directly to the individuals involved in the violations, the Committee has voted to impose a show cause requirement (as set forth in Part II-F of this report) in accordance with the provisions of Section 7-(a)-(12)-(i) of the Official Procedure Governing the NCAA Enforcement Program. This requirement relates to the University's former head basketball coach, a former assistant basketball coach, the present head basketball coach and various representatives of the University's athletic interests. Considering the nature of the violations in which these individuals are involved (as set forth in Part I of this report), the Committee believes that it is apparent the show cause requirement in each case is fully justified. Accordingly, it is the Committee's position that the sanctions proposed in this case are

appropriate and consistent with the principles and purposes of the Association's enforcement program.

7. The Committee believes this to be a most serious case. In determining a penalty, the Committee has attempted to review the various violations in comparison with those found in other infractions cases considered by the Committee and the Council. While recognizing that no two cases are exactly alike, the Committee concluded after extensive consideration that the proposed penalties in this case are in keeping with the penalties imposed by the Committee and Council in previous infractions cases.

III. Origin of case.

Under date of June 21, 1971, a letter was received by the NCAA executive office alleging the improper recruitment of prospective student-athlete Dan Cunningham (Salinas, California) by representatives of the University of Nevada, Las Vegas. Subsequent to receipt of this information, additional information was received by the NCAA alleging the improper recruitment and improper certification of eligibility of other prospective student-athletes.

Under date of November 28, 1972, the Committee on Infractions submitted a notice of preliminary inquiry to the chief executive officer of the University of Nevada, Las Vegas. During inquiries into these initial allegations, the NCAA continued to receive information alleging additional allegations of the Association's legislation on the part of the University and therefore, proceeded to investigate these charges.

Under date of February 25, 1976, the Committee on Infractions submitted an official inquiry to the chief executive officer of the University of Nevada, Las Vegas, and under date of June 21, 1976, the Committee filed a supplemental official inquiry with the University's chief executive officer.

The University's initial response to the Committee's official inquiry and supplement was received on October 29, 1976. The University submitted an additional response to certain allegations on December 3, 1976, and submitted additional materials for the Committee's consideration on November 14, 1976, and March 4, 1977. The University's representatives appeared before the Committee on November 14 and December 13-14, 1976, and March 13, 1977.

Upon consideration of the Committee on Infractions' Confidential Report No. 123 (47) dated April 26, 1977, the University initiated an appeal to the Council in accordance with Section 5 of the Official Procedure Governing the NCAA Enforcement Program.

IV. Related factors appropriate for consideration in judgment of case.

A. The Council should note that the University's hearing before the Committee on Infractions in this case was conducted over a four-day period (November 14 and December 13-14, 1976, and March 13, 1977), resulting in more than 26 hours of discussion of the allegations in this case. Further, the Committee members spent a considerable number of additional hours both individually and collectively in reviewing written information submitted by the University, and in consid-

ering all information presented in order to determine its findings and the proposed penalties in this case. In this regard, the Committee considered more than 70 separate allegations in this case and eventually made 38 separate findings of violations or questionable practices.

B. The Committee believes it appropriate to note that the University did not develop any information during the course of its investigation of this case resulting in the self-disclosure of any violation of NCAA legislation to the Committee. Accordingly, all of the findings in this case resulted from allegations developed through investigation by the NCAA.

C. The Committee notes that in developing its position concerning the validity of the numerous allegations in this case, the University has relied primarily upon information reported or secured by individuals associated with the athletic interests of the University (e.g., University coaches, enrolled student-athletes, representatives of the University's athletic interests and close associates of these coaches or representatives). The information provided by these individuals to the University is often in direct conflict with information reported to the NCAA investigative staff; further, in some instances the conflicting information is provided by the same individuals (e.g., John Bayer, Rudy Jackson, Robert Kelley, Harvey Munford, Eddie Owens, Rodney Parker and Ricky Sobers).

In weighing the information reported by all sources in an attempt to determine the facts,

the Committee noted that the information initially provided the NCAA by those individuals who have reported conflicting information in this case included specific details associated with the violations; further, that these individuals had no reason to provide detailed false information during their initial interviews with the NCAA; finally, that information provided the University by these individuals in subsequent interviews reflected changes which served the athletic interests of the institution. In this regard, it has been the Committee's experience that oftentimes individuals closely associated with the personnel or athletic interests of the institution under inquiry, as well as individuals employed by the institution, are motivated to provide information which would protect the the institution's athletic interests. Further, those individuals directly involved in alleged violations oftentimes are motivated to provide information which would protect their own personal interests.

The Committee believes the Council should also note that the University utilized the services of certain principals identified in alleged violations to contact other individuals cited in various allegations in order to make arrangements for these individuals to provide statements ultimately utilized to develop the University's position as set forth in its response to the official inquiry. In addition, the University relied in part upon statements developed by a principal in this case to make various charges against members of

the NCAA investigative staff. Finally, certain individuals reporting information in support of the University's athletic interests in this case were provided commercial airline transportation at no cost to them to travel from out-of-state locations in order to be interviewed in Las Vegas, a location the University described to the Committee as a "neutral site." The Committee notes that it would appear difficult for the University to weigh the objectivity of information obtained as a result of these procedures.

D. In the Committee on Infractions' view, the involvement of head basketball coach Jerry Tarkanian in the finding set forth in Part I-F-1 of this report constitutes a most serious violation of NCAA regulations in that it represents a disregard for the fundamental cooperative principle of the NCAA enforcement program and is contrary to the basic principles of ethical conduct. Further, the Committee believes the findings set forth in Parts I-G-1 and I-H-7 of this report are most serious inasmuch as these violations, which involve the University's former head basketball coach, John Bayer (I-G-1), and the University's present head basketball coach, Jerry Tarkanian (I-H-7), relate to the academic qualifications of student-athletes.

E. The University, in presenting its case to the Committee, has charged that certain members of the NCAA staff did not collect information reported in this case in an objective and impartial manner, and in some instances may have knowingly misrepresented and falsified infor-

mation presented to the Committee for its consideration during the hearings in which the University participated.

The Committee believes it has provided the University every opportunity to present information and evidence to support its contentions. The University submitted materials to the Committee related to these charges at the time of its first hearing on November 14, 1976, and submitted additional related materials to the Committee under dates of December 3, 1976, and March 4, 1977. Further, these charges were reviewed during the University's appearances before the Committee when information related to the allegations in this case was presented by representatives of the University and the NCAA staff for consideration by the Committee.

Thereafter, in light of the seriousness of these charges, the Committee authorized a special hearing on March 13, 1977, for the purpose of permitting the University, its head basketball coach, Jerry Tarkanian, and his personal legal counsel to question enforcement representatives and review specific charges concerning information reported in this case by Robert Kelley and Rodney Parker. Although the Committee was provided written background material concerning the charges in question, neither the principal investigator in this case nor any other NCAA staff member was provided this material prior to or during this hearing.

After careful consideration of all information presented by the University, Jerry Tarkanian,

his personal legal counsel and the NCAA staff in this case, it is the Committee's conclusion that the University's charges in regard to the NCAA enforcement staff, including the principal investigator in this case, are without substance. In this regard, it is the Committee's position that information related to these charges was developed under questionable circumstances, primarily from individuals motivated to provide information to protect the interests of Tarkanian and the University.

Further, it is the Committee's opinion that the NCAA enforcement staff has investigated this case in accordance with the high standards of personal integrity required in the processing of all infractions cases presented to the Committee. Therefore, the Committee is concerned that the attacks against the enforcement staff in this case have been designed in part to direct the Committee's attention away from the facts related to the alleged violations involving the University. The Committee believes the University's reliance upon this type of approach has actually hindered the development of factual information by the University in its review of alleged violations in this case.

In this regard, the Committee does not believe that the University, in all instances, investigated the numerous allegations submitted in this case with a commitment to determine whether each allegation was substantially correct. Rather, it is the Committee's opinion that in considering these allegations, particularly

those related to head basketball coach Jerry Tarkanian, the University chose to direct its efforts toward developing a defense by attacking the credibility of individuals reporting information contrary to its interests and attempting to impugn the integrity and procedures of the NCAA investigative staff, rather than directing a similar effort toward attempting to determine whether the alleged violations had actually occurred.

F. At various times during the processing of this case, the University has challenged and questioned the Association's procedures. The Committee's responses to these challenges and questions, in regard to the procedures, are set forth for the most part in letters to the University's president, its chancellor and its legal counsel (the chief deputy attorney general, Nevada) dated November 28, 1972; March 14, 1974; April 23, 1974; Janu 19, 1976; February 25, 1976; May 21, 1976; June 2, 1976; June 8, 1976; June 21, 1976; June 24, 1976; September 14, 1976; November 5, 1976; December 4, 1976; April 26, 1977; May 27, 1977, and July 29, 1977. It is the Committee's opinion that these letters accurately describe procedures that were followed in this case, and the basis therefore in regard to each procedure challenged or questioned by the University. Rather than summarize the contents of this correspondence, the Committee calls to the Council's attention that this information is a matter of record for the Council's consideration.

G. As the Council is aware, the Official Procedure Governing the NCAA Enforcement Program (as set forth in the NCAA MANUAL) is established by the Council, approved and adopted by the NCAA membership, and implemented by the Committee on Infractions in accordance with the authority vested in the Committee under the Association's Constitution, Bylaws and the Official Procedure itself. During the processing of infractions cases, the Committee acts under this authority to implement the Official Procedure and respond as necessary to questions which arise concerning the guidelines, policies and procedures of the Committee in situations not specifically described under the Official Procedure. Responses to questions concerning the applicable guidelines, policies and procedures to be followed in such situations are provided by the Committee on Infractions to each member institution involved in an infractions case, including the University of Nevada, Las Vegas.

Specifically, the University of Nevada, Las Vegas, has been notified that the general procedures to be followed in an infractions case are contained in the Official Procedure set forth in the NCAA MANUAL, and in each instance in which the University has requested additional information concerning Committee guidelines related to particular situations in this case, the University has been fully informed of applicable operating policies and procedures (reference: Part IV-F of this report). Nonetheless, the University has also requested a statement of all

Committee on Infractions guidelines, policies and procedures (developed in response to specific situations arising in the processing of current and past infractions cases) which were in effect at any time during the processing of this case.

Upon receipt of the University's request for this additional information, the Committee informed the institution that the various decisions made by the Committee in reference to situations involving different infractions cases were recorded in Committee minutes related to those cases and in some instances were included in the confidential records describing the specific details of those cases. Further, the Committee noted that the guidelines, policies and procedures developed in response to situations in past cases were subject to continual review, and any compilation of such information would not affect the University's position in this case inasmuch as the Committee would continue to respond to any questions posed by the University concerning policies and procedures applicable to situations arising in this case. In this regard, the Council's attention is again directed to Part IV-F of this report.

In addition, as the Council is aware, the Committee on Infractions is in the process of compiling previously recorded Committee policies and procedures on file, as well as drafting additional proposed policies and procedures for the review and approval of the Committee and the Council. Subsequent to the review of the

Committee and the Council, this statement will be made available to the NCAA membership in general.

Accordingly, the Committee has informed the University that once the compilation of this material (presently under way at the direction of the Council) is completed and approved by the Committee and the Council, a copy of the compilation will be forwarded to the University of Nevada, Las Vegas. However, the Committee has denied the University's request for an additional statement of the Committee's past policies, inasmuch as it would be necessary for the Committee to edit past Committee minutes, deleting all references to other member institutions and preparing a statement of these decisions in the context of the various circumstances affecting each particular case, a task the Committee believes is unnecessary to undertake merely for the informational purposes of one institution, particularly in light of other factors related to the University's request.

In this regard, the Committee on Infractions asks the Council to note the following significant factors relevant to the University's request for this additional information: (1) this infractions case has been processed in the same manner as any other infractions case, fully in accordance with the Official Procedure Governing the NCAA Enforcement Program and the Committee on Infractions' policies and procedures; (2) in the Committee's opinion, the University has been

fully advised of all applicable policies and procedures throughout the processing of this case; (3) all specific questions and procedural challenges posed by the University in regard to Committee on Infractions policies and procedures have been answered by the Committee, which remains prepared to answer any additional questions, and (4) the Committee on Infractions and the Council are in the process of reviewing a codification of current Committee on Infractions policies and procedures in order to compile a statement which will be made available to the NCAA membership in general.

Finally, it should be noted that the distribution of the Committee's operating policies and procedures to the NCAA membership in general will not eliminate the need for future notification of procedural changes to institutions involved in infractions cases, nor will it eliminate the need for institutions to contact the Committee to request answers to new procedural questions which may arise in a particular infractions case. Obviously, new procedural questions will arise which will require consideration by the Committee on a case-by-case basis. Accordingly, it will be necessary for the Committee to continue to advise involved member institutions of applicable policies and procedures in their particular cases, as the Committee has done throughout the processing of this case involving the University of Nevada, Las Vegas.

V. Disciplinary or corrective actions taken by institution or conference, or any other agency involved in particular incident.

A. The Committee is not aware of any disciplinary action taken in this case by the University or any other agency.

B. The University has reported that prior to June 1973, the University reorganized its department of athletics and replaced its president, director of athletics and basketball coaching staff. In this regard, the Council's attention is directed to Item 3 on page 32 of this report.

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-1061

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Petitioner,

vs.

JERRY TARKANIAN,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

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STATEMENT OF THE CASE

On September 7, 1977, the University of Nevada, Las Vegas ("UNLV") suspended Jerry Tarkanian ("Tarkanian") from his employment as Head Basketball Coach and ordered him to refrain from any and all relations with UNLV's intercollegiate athletic program for a period of two years.[1] Tarkanian was suspended by UNLV at the insistence of the National Collegiate Athletic Association ("NCAA") following a four-year investigation by the NCAA of alleged infractions of NCAA rules by Tarkanian and other individuals connected with UNLV's basketball program.[2]

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[1] The suspension was effective as of 5:00 p.m. on September 9, 1977. On September 8, 1977, Tarkanian initiated the present litigation and obtained preliminary and later permanent injunctive relief against the suspension.

[2] The NCAA claims it only "recommended" suspension. However, UNLV was given three choices: (1) suspend Tarkanian; (2) reject the NCAA-mandated sanction and risk still heavier sanctions such as indefinite probation for UNLV; or (3) pull out of the

Jerry Tarkanian has been a tenured professional employee of UNLV since July 1, 1977, with a continuing appointment as "Head Basketball Coach and Prof. of Physical Education." However, Tarkanian's only services for UNLV since his initial appointment in the spring of 1973 have been as Head Basketball Coach.[3] Tarkanian's employment agreement with UNLV provided that if he did not continue his duties as Head Basketball Coach, he could remain as Assistant Athletic Director or

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NCAA. Withdrawal from the NCAA or even an indefinite probation would have resulted in economic hardship for UNLV, with a ban on post-season play and television appearances for all sports. In reality, UNLV had no choice but to suspend Tarkanian. As Arthur Reynolds, Chairman of the NCAA Committee on Infractions, observed, the NCAA is the "only game in town."

3 Tarkanian had been a head basketball coach for 17 consecutive years prior to his appointment at UNLV. When Tarkanian was hired by UNLV, the president of that institution agreed to renew Tarkanian's one-year contract until he qualified for tenure.

Director of Community Relations for the Thomas-Mack Arena, but with a reduction in his yearly salary by some $72,000.

UNLV is organized and exists under the constitution and laws of the State of Nevada and is financed by state funds. As a member institution of the NCAA, UNLV contractually agreed to administer its athletic program in accordance with NCAA rules and regulations. As a condition of its membership, UNLV delegated to the NCAA authority to investigate and determine violations of NCAA rules by representatives of UNLV, and to impose penalties or sanctions upon UNLV for any violations. Sanctions available to the NCAA include requiring the member institution to suspend or even terminate athletic department personnel implicated in any violation.

Investigations into alleged infractions are conducted by the NCAA investigative staff ("staff") on behalf of the association's Committee on Infractions ("Committee"). Staff typically conducts a preliminary inquiry to determine if there is sufficient evidence to warrant an official inquiry by the Committee. If the Committee authorizes an official inquiry, staff then conducts such inquiry. The Committee has never refused a request by staff for authorization to issue an official inquiry. In practice, the Committee simply rubberstamps staff's decision to issue the official inquiry without knowledge of any details which may or may not support that decision.

On or about February 26, 1976, after staff had conducted a three-year preliminary inquiry into UNLV's athletic policies and practices, the Committee issued an Official Inquiry to UNLV.

Approximately half of the 72 infractions initially alleged concerned the UNLV basketball program under Tarkanian. Several alleged infractions involved Tarkanian personally. The NCAA gave UNLV a June 1, 1976, deadline by which to respond to the Official Inquiry.

After receiving the Official Inquiry, UNLV enlisted the Office of the Attorney General of the State of Nevada ("Attorney General") and retained private counsel to conduct an investigation to determine if and how each alleged violation occurred. The NCAA Manual contained no guidelines, policies, or procedures governing the type of response to be made by UNLV, the conduct of its investigations, or the conduct of NCAA hearings.[4] Consequently on March 24, May 13, and May 21, 1976, the

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[4] The NCAA Manual provides that "[t]he exact procedure to be followed in the conduct of the hearing will be determined by the committee."

Attorney General requested Warren S. Brown ("Brown"), then Assistant Executive Director in charge of the NCAA enforcement division, to provide a definitive outline of the procedures for UNLV to follow.[5] Unbeknownst to UNLV and Tarkanian, the policies and procedures had never been codified but were scattered throughout Committee minutes. Despite UNLV's repeated requests for procedural guidelines, Brown did not respond to the Attorney General until June 2, 1976, after the deadline for a response had passed.[6]

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[5] The Attorney General's questions included: who will be allowed to attend the NCAA hearings; may UNLV bring witnesses; is cross-examination permitted; what type of evidence will be allowed; will sworn affidavits be given greater weight than hearsay statements; what is and who has the burden of proof; and may a reporter transcribe the hearing?

[6] Brown did confirm that UNLV's request for an extension of time to file its response had been granted.

Brown replied to the Attorney General's inquiries as follows: (1) while UNLV was required to submit to the Committee all available information related to the allegations, the NCAA would not reveal to UNLV any information provided by individuals interviewed by staff investigators; (2) at the hearing, staff would disclose the identity of its sources as well as any details or evidence reported by individuals interviewed by staff; (3) only individuals officially representing the university could be present at the infractions hearing; (4) only the Committee could present witnesses; (5) UNLV's representatives could "debate" any of the information reported to the Committee; (6) only a tape recording and no transcript of the hearing would be authorized; and (7) UNLV had to assume the burden of proof.

Despite UNLV's request that the NCAA abide by its bylaw that it give a member under investigation notice of the facts on which specific charges were based, the NCAA refused to follow its own rules.[7] Unaware of the basis of staff allegations, UNLV and Tarkanian were therefore unprepared at the first and second sessions of the Committee hearing to explain why a particular source purportedly gave different answers on the same question to different people at different times.

Lacking guidance as to the form of evidence expected by the Committee, UNLV conducted its investigation upon the

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[7] NCAA Bylaw 7-5-(c) provides that a member under investigation:

(1) Shall be given notice of any specific charges against it, and the facts upon which such charges are based; and

(2) Shall be given an opportunity to appear before the Committee on Infractions (or Council upon appeal) to answer such charges by the production of evidence.

(Emphasis added.)

assumption that affidavits or sworn statements and documentary evidence would be more persuasive. One set of UNLV's official response consisted of a restatement of each allegation, a statement indicating whether UNLV agreed that a violation had occurred, and two file boxes full of affidavits, sworn statements or depositions, and documentary evidence supporting UNLV's denials of allegations. Although prior to the hearing neither UNLV nor Tarkanian knew what facts or information staff had developed or would present to support the allegations, the NCAA staff studied UNLV's official response and contacted persons who had supplied UNLV with affidavits or sworn statements.

By letter received only five days before the hearing, the NCAA informed UNLV that any current UNLV employee named in an allegation could be represented by legal

counsel. The notice came too late for Tarkanian, who did not have legal counsel present because his attorney had made other commitments as a result of the NCAA's prior position that only UNLV attorneys could be present.

When the infractions hearing was held on November 14, and December 13 and 14, 1976, staff's presentation on allegations involving Tarkanian consisted entirely of three unsworn NCAA staff investigators, David Berst ("Berst"), Hale McMenamin ("McMenamin"), and William Hunt ("Hunt"), orally relating their or another investigator's recollection of conversations with certain individuals concerning their purported knowledge of facts or hearsay regarding violations of NCAA legislation. The investigators based their remarks solely upon memoranda of interviews which had not been reviewed for inaccuracies by the purported interviewees

and which were not supported by a scintilla of documentary evidence. The notes which formed the basis of the memoranda, often prepared long subsequent to the interview, were destroyed prior to the hearing. The memoranda were not made available to Tarkanian, his legal counsel, UNLV, or its legal counsel, despite several requests prior to and at the infractions hearing.

Since the NCAA refused to disclose its sources of information for the allegations against Tarkanian and UNLV, the Attorney General and UNLV asked its interviewees whether they had provided information to the NCAA contrary to that which they had given UNLV. They said they had not. All of the evidence uncovered by UNLV's counsel and the Attorney General revealed Tarkanian's complete innocence of the allegations.

When UNLV and Tarkanian appeared at the infractions hearing, they heard for the first time the "facts" behind the allegations and the identity of each person who provided the "facts." Nevertheless, as the Chairman of the Committee observed, in every material instance the oral testimony given by staff to support the allegations against Tarkanian conflicted directly with the affidavits, statements and depositions obtained by UNLV's counsel and the Attorney General from staff's own sources.

During the course of the hearings, the NCAA conceded that at least eight allegations concerning Tarkanian lacked sufficient information to support a finding of a violation. Staff investigator Berst even admitted that one allegation he made against Tarkanian was based on pure speculation.

After the December session of the hearing, UNLV and Tarkanian received information which suggested that Berst and McMenamin had provided false and misleading information on crucial issues. At a special and limited hearing conducted by the Committee for purposes of determining whether it had been intentionally misled by its investigators, staff took the position, incredibly upheld by the Committee, that it had the right to misrepresent the facts! When Tarkanian's attorney attempted to question Berst about his relationship with one source, the Committee refused to allow disclosure of the source's identity on grounds of confidentiality.

On April 26, 1977, the NCAA mailed to UNLV a Confidential Report, later recast as the Expanded Confidential Report, consisting of its findings and penalties to be imposed. Tarkanian was named in 10

of the 38 violations found by the Committee. The Committee issued its findings in Confidential Report No. 123(47) which directed UNLV to show cause why additional penalties should not be imposed against it if it did not suspend Tarkanian from involvement with the University's intercollegiate athletic program for two years. On May 13, 1977, UNLV gave written notice of its appeal of certain findings and penalties, including all findings involving Tarkanian, to the NCAA Council ("Council").

At the appeal hearing on August 22, 1977, the Council did not have before it any transcript or tape recording of the Committee hearings, and few evidentiary documents. During the course of its deliberations, the Council summoned Berst, McMenamin and Hunt in order to interrogate them about their integrity, veracity, and objectivity, a major issue raised and

argued by UNLV in its appeal. This ex parte session occurred without notice to, knowledge of, or participation by Tarkanian or UNLV. The Council did not even make a tape recording of the session, during which nearly all of the Council members questioned the investigators. At the conclusion of its deliberations, the Council voted to affirm the Committee's findings and penalties en masse.

On August 26, 1977, the NCAA issued a 10-page release to the media. It summarized the Committee's findings involving Tarkanian, at least two of which charged him with dishonest, immoral, or illegal conduct. As a direct result of the NCAA's action against Tarkanian and UNLV and the publicity attendant thereto, several contracts which Tarkanian had received to conduct basketball coaching clinics in Colorado, New Mexico, Missouri,

and California were cancelled by the sponsors.

On September 6, 1977, UNLV conducted a hearing, presided over by Dr. Brock Dixon as hearing officer, to determine disciplinary or corrective action to be taken against Tarkanian in accordance with the directive of the NCAA. The sole presentation made by UNLV at this proceeding consisted of having Dr. Lorne Seidman, counsel for UNLV, read and question Tarkanian about the findings involving Tarkanian contained in the Expanded Confidential Report. Although Dr. Dixon found that the factual basis for the NCAA's charges and sanctions as they applied to Tarkanian was clearly in doubt, he concluded that UNLV was contractually compelled to adopt the findings and penalty contained in the NCAA's Expanded Confidential Report. The alternatives were heavier sanctions or complete

withdrawal from the NCAA. The President of UNLV, Donald H. Baepler, accepted the hearing officer's recommendation and on September 7, 1977, UNLV gave Tarkanian written notice that the NCAA penalty against Tarkanian would become effective at 5 p.m., Friday, September 9, 1977. When President Baepler's efforts to persuade the NCAA to impose some alternative disciplinary action proved futile, Tarkanian instituted the present litigation.

REASONS FOR DENYING THE PETITION

I. The State Action Holding Is Consistent With Settled Law.

To constitute state action, the conduct allegedly causing the deprivation of a federal right must be "fairly attributable to the state." Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 937 (1982); Rendell-Baker v. Kohn, 457 U.S. 830, 838 (1982). This requirement is satisfied when public officials and a private entity act jointly or in concert with one another to cause the deprivation. Lugar, 457 U.S. at 937; Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). State action will also be found when a private party is serving a function which is "traditionally the exclusive prerogative of the State." Blum v. Yaretsky, 457 U.S. 991, 1005 (1982) (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 353 (1974)); Rendell-Baker, 457 U.S. at 842.

As the court below noted, UNLV delegated to the NCAA its authority to discipline Tarkanian for violations of NCAA rules. By imposing the NCAA-ordered sanctions against Tarkanian, UNLV acted jointly with the NCAA. "It is well settled that prohibited action taken in concert by public officials and a private entity is state action regardless of whether the ultimate illegal sanctions were imposed by the private entity or a public official." Adams v. Bain, 697 F.2d 1213, 1217 (4th Cir. 1982) (citing Adickes, supra).

Furthermore, as the court below properly held, Jerry Tarkanian is a state employee, and the right to discipline a state employee in Nevada is traditionally the exclusive prerogative of the state. See NRS 396.320; Board of Regents of University of Nevada v. Oakley, 97 Nev. 605, 637 P.2d 1199 (1981); State ex rel.

Richardson v. Board of Regents, 70 Nev. 144, 261 P.2d 515 (1953). In ordering Tarkanian suspended, the NCAA performed a function which is traditionally the exclusive prerogative of the state. Accordingly, the court below correctly held that the conduct of the NCAA constituted state action.

Neither this Court's holding in San Francisco Arts & Athletics v. U.S. Olympic Committee, 483 U.S. ___ (1987), nor recent federal decisions involving the NCAA dictate a different result. In San Francisco Arts & Athletics, this Court declined to find state action by the U.S. Olympic Committee in enforcing a statute which gave it the exclusive right to the use of the word "Olympic" because "[t]he Act merely authorized the USOC to coordinate activities that always have been performed by private entities. Neither the conduct nor the coordination

of amateur sports has been a traditional government function." 483 U.S. at ___ (footnotes omitted).

Similarly, in each of the recent decisions involving the NCAA, the court has held that the promulgation and application by the NCAA of legislation prohibiting or restricting participation by student-athletes in NCAA-sponsored events did not constitute state action. Karmanos v. Baker, 816 F.2d 258 (6th Cir. 1987) (hockey player declared ineligible); Graham v. NCAA, 804 F.2d 953 (6th Cir. 1986) (football player declared ineligible); Arlosoroff v. NCAA, 746 F.2d 1019 (4th Cir. 1984) (tennis player declared ineligible); Hawkins v. NCAA, 652 F. Supp. 602 (C.D. Ill. 1987) (basketball team placed on probation and barred from post-season competition); Barbay v. NCAA, No. 86-5697 (E.D. La. 1987) (football player declared ineligible); McHale v.

Cornell University, 620 F. Supp. 67 (N.D.N.Y. 1985) (football player declared ineligible). The courts declined to find state action because "[t]his conduct was taken as part of the NCAA's function in regulating intercollegiate athletics." Graham, 804 F.2d at 958.

This case is significantly different. The conduct of the NCAA, in ordering UNLV to suspend Tarkanian, involved much more than the "conduct and coordination of amateur sports" or the "regulation of intercollegiate athletics." In imposing this particular sanction, the NCAA interfered with and attempted to sever the employment relationship between a state university and its tenured professional employee. The NCAA in effect assumed the role of public employer for purposes of discipline. Such conduct by a private actor in connection with a public institution consistently has been held to

constitute state action. Cf. Malak v. Associated Physicians, Inc., 784 F.2d 277 (7th Cir. 1986); Krynicki v. University of Pittsburgh, 742 F.2d 94 (3d Cir. 1984); Adams v. Bain, 697 F.2d 1213 (4th Cir. 1982); McVarish v. Mid--Nebraska Community Mental Health Center, 696 F.2d 69 (8th Cir. 1982).

Nothing in the decision of the court below provides justification for this Court to grant a writ of certiorari on the issue of state action. The court below recognized the distinction between the cases relied upon by petitioner and the case before it. The court properly applied the tests utilized by this Court to determine state action, as set forth above, and only after "sifting facts and weighing circumstances," Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961), concluded that the conduct of the NCAA rose to the level of

state action. Accordingly, the petition should be denied.

II. The NCAA Hearings Did Not Satisfy The Requirements Of Procedural Due Process.

Tarkanian has a property interest in his employment as Head Basketball Coach at UNLV by reason of his employment contract. Tarkanian also has a liberty interest in his position, which has been impaired because the NCAA's findings impugned his reputation and stigmatized his freedom to take advantage of other employment opportunities. See Cleveland Board of Education v. Loudermill, 470 U.S. 532, 538, 542 (1985); Paul v. Davis, 424 U.S. 693, 710-11, reh'g denied, 425 U.S. 985 (1976); Goss v. Lopez, 419 U.S. 565, 572-73 (1975); Board of Regents of State Colleges v. Roth, 408 U.S. 564, 569-70, 572, 573-74, 576-77 (1972); Stewart v. Bailey, 556 F.2d 281 (5th Cir. 1977);

Wright v. Arkansas Activities Association, 501 F.2d 25 (8th Cir. 1974). These constitutionally protected interests entitle Tarkanian to a hearing which "must be granted at a meaningful time and in a meaningful manner." Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (emphasis added); Armstrong v. Manzo, 380 U.S. 545, 552 (1965). A meaningful opportunity to be heard includes the "right to be informed not only of the nature of the charges but also of the substance of the relevant supporting evidence." Brock v. Roadway Express, Inc., ___ U.S. ___, ___ (1987). Due process requires an opportunity to refute the charges. See Loudermill, 470 U.S. at 544; Mathews v. Harney County, Or., School Dist. No. 4, 819 F.2d 889, 893-94 (9th Cir. 1987).

The NCAA never informed Tarkanian of the substance of the relevant evidence supporting the charges against him;

instead, the evidence presented by staff consisted only of staff's own recollections of conversations with other investigators and interviewees. Considering the gravity of the charges and the extent of the resultant deprivation, the NCAA failed to provide Tarkanian with a meaningful opportunity to be heard. Cf. Washington v. Kirksey, 811 F.2d 561, 563-64 (11th Cir.), cert. denied, ___ U.S. ___ (1987); Stanley v. Big Eight Conference, 463 F. Supp. 920, 931-33 (W.D. Mo. 1978).

Fair play is the "essence of due process." Galvan v. Press, 347 U.S. 522, 530, reh'g denied, 348 U.S. 852 (1954); see also Lassiter v. Department of Social Services of Durham County, 452 U.S. 18, 33, reh'g denied, 453 U.S. 927 (1981). As the trial court and the court below recognized, in Tarkanian's case, the NCAA did not play fairly. See A12, A36.

III. The NCAA's Decision To Suspend Tarkanian Deprived Him Of Substantive Due Process.

Substantive due process of law is the constitutional guarantee that no person shall be deprived of life, liberty or property for arbitrary or capricious reasons. Harrah Independent District v. Martin, 440 U.S. 194, 198 (1979).

When protected property and liberty interests are at stake, any state action taken which affects those interests must be based upon substantial evidence. Moore v. Warwick Public School Dist. No. 29, 794 F.2d 322 (8th Cir. 1986); Alsbury v. United States Postal Service, 530 F.2d 852 (9th Cir.), cert. denied, 429 U.S. 828 (1976); Vigil v. Post Office Department of The United States, 406 F.2d 921, 924 (10th Cir. 1969); Peters v. United States, 408 F.2d 719, 721-22, 724 (Ct. Cl. 1969); Denver Union Stock Yard Co. v. United

States, 21 F. Supp. 83, 90 (D. Colo. 1937), aff'd 304 U.S. 470 (1938); Allen v. State, 100 Nev. 130, 134, 676 P.2d 792, 794 (1984); cf. Schware v. Board of Bar Examiners, 353 U.S. 232, 246-47 (1957).

In the instant case, not only was there no "substantial evidence" supporting the NCAA's deprivation of Tarkanian's property and liberty interests, there was no evidence. The evidence gathered by the Attorney General and UNLV's private counsel totally disproved all charges against Tarkanian. The NCAA arbitrarily and capriciously deprived Tarkanian of his property and liberty interests by suspending him in the face of such exculpatory evidence. Accordingly, the court below properly concluded that the NCAA deprived Tarkanian of substantive due process.

CONCLUSION

If this Court were to hold that the NCAA did not engage in state action in this instance, it would permit UNLV, a state institution, to avoid the restrictions placed upon it by the Constitution by simply relinquishing its governmental authority to the NCAA. Contrary to petitioner's contention, a decision to reverse the holding of the Nevada Supreme Court would require this Court to overturn well-settled law which began with Board of Regents v. Roth in 1972. Accordingly, NCAA's petition should be denied.

Respectfully submitted,

LIONEL SAWYER & COLLINS

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Supreme Court, U.S.
FILED
APR 29 1988
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CLERK

No. 87-1061

In the Supreme Court of the United States

OCTOBER TERM, 1987

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Petitioner,

vs.

JERRY TARKANIAN,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

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Petition for Writ of Certiorari Filed December 23, 1987.
Certiorari Was Granted February 22, 1988.

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August 27, 1987—Nevada Supreme Court, Opinion.

February 25, 1988—Nevada Supreme Court, Order.

UNIVERSITY OF NEVADA, University of Nevada, Las Vegas, Donald H. Baepler, as President of the University of Nevada, Las Vegas, and an Officer of the University of Nevada, and James Buchanan, II, Dr. Fred Anderson, John Buchanan, Lilly Fong, Chris Karamanos, Molly Knudtsen, Dr. Louis Lombardi, Brenda Mason, John Tom Ross, as Members of the Board of Regents of the University of Nevada,
Appellants,

v.

Jerry TARKANIAN,
Respondent.

No. 10425.

Supreme Court of Nevada.

May 17, 1979.

OPINION

MOWBRAY, Chief Justice:

The respondent, Jerry Tarkanian, commenced this action in the district court seeking declaratory and injunctive relief from a severance order barring Tarkanian from association with the athletic program of the University of Nevada, Las Vegas (UNLV).

UNLV, its president and regents have appealed. The National Collegiate Athletic Association (NCAA), whose report of Tarkanian's activities was the predicate for UNLV's order of suspension, is not a party to this action. The NCAA has filed an amicus curiae brief with this court.

THE BACKGROUND OF THE LITIGATION

UNLV is a public institution of higher learning which is financed by the State of Nevada. It is a member of the NCAA, an unincorporated association of approximately 830 members, including virtually all four year colleges and universities in the United States with major intercollegiate athletic programs. As a member of the NCAA, UNLV contractually agrees to administer its athletic program in accordance with NCAA legislation. The NCAA Constitution provides that "Legislation governing the conduct of intercollegiate athletic programs of member institutions shall apply to basic athletic issues such as admissions, financial aid, eligibility and recruiting; member institutions shall be obligated to apply and enforce this legislation, and the enforcement program of the Association shall be applied to an institution when it fails to fulfill this obligation." Primary responsibility for administering the NCAA enforcement program has been delegated to the Committee on Infractions.

On February 26, 1976, the NCAA Committee on Infractions initiated enforcement proceedings involving UNLV by submitting an Official Inquiry to its president, respondent Dr. Baepler. The Official Inquiry was the result of a preliminary investigation conducted over a period of approximately three years by the NCAA investigative staff. The Official Inquiry included, *inter alia*, allegations that Tarkanian had violated NCAA legislation. Upon receipt of the letter of inquiry, UNLV enlisted the aid of the Attorney General of the State of Nevada to conduct a "cooperative investigation".

Hearings before the Committee on Infractions were conducted on November 14, 1976; December 13, and 14,

1976; and March 13, 1977. The record contains the following description of the nature of these proceedings by an NCAA official:

> Once the institution has collected all available information, it then meets with the Committee on Infractions to discuss the information which it has obtained and previously submitted to the Committee in writing. The purpose of this hearing before the Committee on Infractions is for both the institution and the NCAA investigative staff, for the first time, to present specific information to the Committee concerning alleged violations of NCAA legislation. This procedure provides an adequate opportunity for the institutional representatives to debate any of the information presented to the Committee by the investigative staff or the institution, and to be advised of the source of the information upon which each allegation is based. Both the Committee on Infractions and the University will be informed at the hearing of the identity of the scource of evidence upon which an allegation is based as well as any actual details or evidence reported by individuals interviewed.

The requests of UNLV for prior disclosure of the factual bases or sources of the allegations contained in the letter of inquiry had been denied. Shortly before the first hearing was scheduled, the NCAA notified the university that it had changed its prior position and would allow counsel representing university employees named in the allegations to be present. Tarkanian was present at all of the hearings and was represented by counsel at the second and third. According to the record herein, "the

charges and allegations against Jerry Tarkanian were presented by the sole means of having either of two NCAA staff investigators . . . orally relate what each of them recalled of conversations he purportedly had with certain individuals concerning their knowledge of purported violations of NCAA legislation by Jerry Tarkanian." The sources of the information reported to the investigators were not present to give testimony or be cross-examined. A tape recording of the proceedings was made by the NCAA, but no other reporting was allowed, and the tape was not made available for later transcription by the NCAA, although university attorneys were allowed to travel to Kansas City to listen to it.

On April 26, 1977, the Committee on Infractions issued Confidential Report No. 123(47) containing the Committee's findings of violations of NCAA legislation and recommending penalties to be imposed on UNLV for such violations. Among the Committee's findings was a charge that Tarkanian had either contacted or arranged for others to contact principals involved in the infractions investigation in an effort to discourage them from reporting violations to the NCAA or to cause them to give untruthful information to the university's investigators. Included in the penalty section was an order directing UNLV to show cause why additional penalties should not be imposed if it did not take disciplinary action with regard to "Head Basketball Coach Jerry Tarkanian which, in the Committee's present view, should be complete severance of any and all relations Tarkanian may have, formally or informally, with the University's intercollegiate athletic program during the period of the University's probation including, but not limited to, activities associated with administration, supervision, coaching, recruiting,

athletic booster groups and public relations or fundraising activities related to the University's athletic program." The university's attention was drawn to the "responsibilities of the institution" under NCAA legislation "to provide due notice and hearing to the involved individual before taking any disciplinary or corrective action."

UNLV appealed the findings and penalty provisions of the report to the NCAA Council. In its written memorandum the university contested the factual bases for twenty-seven of the Committee's findings, including some twenty which directly or indirectly involved Tarkanian, contending that evidence obtained in its own investigation demonstrated that no violations had occurred. The university was critical of the procedures employed by the NCAA, and attacked the credibility of the two NCAA investigators who had presented information to the Committee on Infractions. Tarkanian and the university were allowed twenty and thirty minutes, respectively, for oral presentation of information to the Council. On August 25, 1977, the NCAA Council accepted the findings and recommended penalty of the Committee on Infractions.

On September 6, 1977, pursuant to notice, Tarkanian was given a hearing before a hearing officer appointed by the university. Tarkanian was advised that the charges were as specified in the NCAA Confidential Report, that he could have assistance of counsel, that he could call witnesses in his behalf, and that he could have a transcript of the hearing made. Though the evidence before the NCAA was discussed, no witnesses were presented. Counsel for Tarkanian took the position that the university's own evidence established that no violations had occurred, while counsel for the university argued that the university

was bound by the findings of the NCAA. In a written decision, the hearing officer concluded that counsel for the university was correct in his argument that "by joining the NCAA we delegated to that organization the establishment of governing standards and their enforcement as well. We are allowed and encouraged to make our own investigations, but this is in no way a substitute for the investigative functions of the NCAA itself. . . . We must accept their findings of fact as in some way superior to our own." He also found that "in this instance the NCAA's standards of proof and due process were inferior to what we might reasonably expect. . . ." He recommended executing the proposed NCAA sanctions. Dr. Baepler notified Tarkanian the following day that he had decided to follow the hearing officer's recommendation, effective September 9, 1977, noting "the University is simply left without alternatives."

THE PRESENT LITIGATION

On September 8, 1977, Tarkanian filed suit against UNLV, President Baepler, and the university's regents, seeking an injunction restraining enforcement of the NCAA sanction by the university, and a declaration that he had been denied procedural and substantive due process of law. A major portion of the complaint was directed to the procedures, findings and penalty of the NCAA. By its answer, the university put Tarkanian's allegation concerning the NCAA's activities and procedures at issue. The university also alleged, as an affirmative defense, that it was "a mere extension of the NCAA and, therefore, plaintiff has been afforded not only the due process hearing provided by the University of Nevada, Las Vegas, but also prior hearings conducted by the NCAA, all in

compliance with the traditional notions of due process of law."

Prior to trial, an extensive "Stipulation of Facts" was filed by the parties. Some 30 of the 37 stipulations concerned the structure and procedures of the NCAA in general, or its actions in this case in particular. Accompanying the stipulated facts were ten exhibits, including correspondence between the university's investigator and the NCAA staff regarding problems encountered by the university related to NCAA procedures.

At trial, Tarkanian and two other witnesses testified as to the effect of a suspension upon Tarkanian's reputation and career. Tarkanian also called the two attorney-investigators for the university, who detailed their problems with NCAA staff and procedure. The only witness questioned as to the evidence for the underlying charges against Tarkanian was the deputy attorney general who had acted for the university during its investigation; he testified that he had found no factual basis for the charges. No witnesses were presented for the defense.

AN ACTUAL CONTROVERSY IS PRESENTED

As a threshold issue, amicus curiae suggests that the case should be dismissed as not presenting an actual controversy. As this court has recognized, " 'The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.' " *State v. Teeter*, 65 Nev. 584, 654, 200 P.2d 657, 691 (1948). The principle requires that a court "act

only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the action of some third party not before the court." *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42, 96 S.Ct. 1917, 1926, 48 L.Ed.2d 450 (1976). *Accord, National Collegiate Athletic Ass'n v. Califano*, 444 F.Supp. 425 (D.Kan.1978). In *State v. McCullough*, 20 Nev. 154, 156, 18 P. 756 (1888), the court observed that "Courts uniformly refuse to consider cases brought upon pretended controversies, when the object of the suit is to get the opinion of the court for the benefit of the parties themselves, or to affect the interest of third persons."

In the instant case, it is clear that the purpose of the university's suspension of Tarkanian was to carry out the mandate of the NCAA, and not merely to create a cause of action for litigation. There is no evidence whatever to suggest that had the university prevailed it would then have reinstated Tarkanian, in defiance of what it had determined were its contractual obligations to the NCAA and in the face of prospective sanctions by the NCAA.

This case does present an actual controversy, and therefore shall not be dismissed.

THE JOINDER OF THE NCAA AS A NECESSARY PARTY

Rule 19 of the Nevada Rules of Civil Procedure provides for the joinder of persons needed for just adjudication. It provides:

> (a) A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action *shall be joined* as a party in the action if (1) in his absence

> complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. *If he has not been so joined, the court shall order that he be made a party.* If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff.

(Emphasis added.)

This provision of the rules of civil procedure reflects certain long-standing policies prevailing in equitable actions, such as the one now before the court, as described in *Robinson v. Kind,* 23 Nev. 330, 47 P. 1, 47 P. 977 (1896). In such cases, all persons with an interest in the subject matter of the suit are to be made parties " 'so that there may be a complete decree which shall bind them all.' " 23 Nev. at 335, 47 P. at 2. If the interest of the absent parties " 'may be affected or bound by the decree, they must be brought before the court, or it will not proceed to a decree.' " *Id.* If a defendant before the court may be subjected to future litigation, or danger of loss, under the decree, the absent person must be made a party. *Id.* at 335-36, 47 P. 1.

As is shown by the mandatory language of Rule 19(a), the enforcement of the rule is not left to the parties themselves. As was said of the prior statute dealing with equitable actions,

> "If there are other persons, not parties, whose rights must be ascertained and settled before the rights of the parties to the suit can be determined, then the statute is peremptory. The court must cause such persons to be brought in. It is not a matter of discretion, but of absolute judicial duty. The enforcement of this duty does not rest entirely upon the the parties to the record. If they should neglect to raise the question and to apply for the proper order, the court, upon its own motion, will supply the omission, and will either directly bring in the new parties, or remand the cause in order that the plaintiff may bring them in."

Robinson v. Kind, 23 Nev. at 338, 47 P. at 3-4. Thus the question of waiver is not appropriate to the determination of this issue, and the trial court or the appellate court may raise the issue *sua sponte. Johnson v. Johnson,* 93 Nev. 655, 572 P.2d 925 (1977). This is sound policy, for the rule thus protects the interest of the courts themselves in the efficacy and integrity of their own proceedings, as well as the interests of the parties.

In the case at hand, it is clear from the pleadings, the evidence presented at trial, and the judgment, that the NCAA should have been joined in this action. First, the interest of the NCAA in the subject matter of this litigation was such that either the university would be affected, or the NCAA's ability to protect its interests would be impaired, and in either case further litigation of the controversy would be likely, should it proceed without joinder of the NCAA.

As the situation now stands, regardless of the outcome of this litigation, the NCAA may claim a contrac-

tual right to bind the university to enforce the NCAA's decision by sanctions it deems appropriate. This is illustrated in the factual background of *Regents of University of Minnesota v. National Collegiate Athletic Association,* 560 F.2d 352 (8th Cir.), *cert. dismissed* 434 U.S. 978, 98 S.Ct. 600, 54 L.Ed.2d 472 (1977), in which the university sought injunctive relief against NCAA sanctions. In that case, the university had been enjoined by a state court from declaring certain students ineligible, pursuant to an NCAA determination, without a prior university hearing comporting with due process. As a result of such hearings, the university refused to suspend the students. The NCAA then placed the university on indefinite suspension, including a ban on post-season play or television appearances for all sports, until the university complied with its directive to declare the students ineligible. The NCAA took the position that it could not "permit an individual institution to retain either interpretive or enforcement authority" over NCAA legislation. *Id.* at 360.[1]

Respondent argues that the court need not be concerned with the university's position on this account, since the university will be insulated by the terms of the lower court's decree from compliance with the NCAA decision. If the university would be so protected, the NCAA would, to that extent, be unable to protect its interests in its enforcement proceedings. *See Ky. H. S. Athl. Ass'n v. Hopkins Cty. Bd. of Ed.,* 552 S.W.2d 685 (Ky.App.1977).

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1. The NCAA's right to impose those sanctions upon the university was upheld by the Court of Appeals, on the ground that the court order, and due process, were complied with when the university hearings were held, affording procedural due process, and determining that the underlying facts found by the NCAA were essentially correct.

An independent ground for requiring joinder in this case is provided by the directive of Rule 19(a) that a person be joined when "complete relief" cannot be accorded the parties before the court in his absence. A major objective of this provision is "to have a final and complete determination of the controversy, not to determine issues piecemeal . . . ." *Investment Co. v. Reno Club,* 66 Nev. 216, 222, 208 P.2d 297, 300 (1949). In this case, the controversy presented involves the NCAA directly, and cannot be completely and justly determined in its absence. The NCAA initiated and controlled the proceedings against UNLV which led to Tarkanian's suspension. The NCAA made the factual findings upon which Tarkanian's suspension was based. To consider the case as if it involved solely the relationship of the university and Tarkanian, or began with the university's notification to Tarkanian of its intent to hold a hearing regarding his proposed suspension, would require the plaintiff to forego constitutional claims to which he may well be entitled.

Plaintiff's fundamental claim in this case is that he was denied his constitutional right to due process of law. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' *Armstrong v. Manzo,* 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965)." *Mathews v. Eldridge,* 424 U.S. 319, 333, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1976). It is clear that the meaningful factual determinations in this case, as well as the decision as to the penalty to be imposed, had been made by the NCAA *before* Tarkanian was afforded a hearing by UNLV. A court of equity, in particular, should not be foreclosed from recognizing this reality, and affording plaintiff the relief to which it may entitle him.

As was observed by the Supreme Court of Oklahoma of a similar attempt by the NCAA to insulate from judicial scrutiny actions it had taken which affected, through a member university, certain coaching employees:

> Courts are normally reluctant to interfere with the internal affairs of voluntary membership associations, however, in particular situations, where the considerations of [public] policy and justice are sufficiently compelling judicial scrutiny and relief are available. In dealing with an organization in which membership is an economic necessity, the courts must be particularly alert to the need for protecting the public welfare and advancing the interests of justice by reasonably safeguarding the individual's opportunity to earn a livelihood while not impairing the proper standards and objectives of the organization. The necessity of court action is apparent when the position of a voluntary association is so dominant in its field that membership in a practical sense is not voluntary but economically necessary.

Bd. of Regents v. Nat. Collegiate Ath. Ass'n, 561 P2d 499, 504 (Okla.1977) (footnotes omitted).

It is therefore clear that the instant case falls squarely within the mandate of NRCP 19(a). We note that the briefs of the parties have cited a number of cases from the federal jurisdictions discussing Fed.R.Civ.Proc. 19(b), which addresses the situation in which a party *cannot* be joined. In such a situation, considerable weight is given the positions taken during litigation by the parties themselves, and to the fact that reversal will require dismissal of the entire action. *See esp., Provident Bank v. Patterson*, 390 U.S. 102, 88 S.Ct. 738, 19 L.Ed.2d 936

(1968). In this case, however, there is no contention that the NCAA is not amenable to service of process or that its joinder would affect the jurisdiction of the court below.[2] In such circumstances, consideration of the issues raised by NRCP 19(b) is not warranted. *See Robinson v. Kind, supra*, 23 Nev. 330, 47 P. 977 (petition for rehearing).

Tarkanian, UNLV and the NCAA, each for its own reasons, preferred the trial to proceed without the joinder of the NCAA. This course did not serve the interest of justice or comply with the requirement of NRCP 19 (a). Remand of the action will, in this case, serve the interest of judicial efficiency by precluding subsequent litigation of the very issues now presented.

We therefore reverse and remand for joinder of the NCAA and further proceedings.

THOMPSON, MANOUKIAN and BATJER, JJ., concur.

GUNDERSON, Justice, concurring.

As my colleagues hold, the NCAA is a necessary party to this litigation. Therefore, I agree it was improper for the district court to act in these premises, without requiring the NCAA's joinder. In the absence of such a joinder, however, I also believe there would be no bona fide, justiciable controversy.

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2. To the contrary, see Corresp. File, affidavit of M. Soloman, 5/8/78; and Amicus Curiae Opposition to Motion to Strike Brief, 5/16/78.

(Filed June 25, 1984)

CASE NO. A173498
DEPARTMENT NO. X
CIVIL DOCKET K

IN THE
EIGHTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF CLARK

JERRY TARKANIAN,
Plaintiff,

vs.

UNIVERSITY OF NEVADA; UNIVERSITY OF NEVADA, LAS VEGAS; DR. LEONARD GOODALL, as President of the University of Nevada, Las Vegas, and Officer of the University of Nevada; and FRANKIE SUE DEL PAPA, LILLY FONG, DOROTHY GALLAGHER, CHRIS KARAMANOS, JOAN KENNEY, DANIEL J. KLAICH, JOHN McBRIDE, JOANN SHERRIN and JUNE WHITELY, as Members of the Board of Regents of the University of Nevada; and the NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, an unincorporated association,
Defendants.

PRELIMINARY STATEMENT, FINDINGS OF FACT, CONCLUSIONS OF LAW, OPINION, ORDER AND JUDGMENT

PRELIMINARY STATEMENT

The Plaintiff (hereinafter "Tarkanian") filed this suit on September 8, 1977, against the University of Nevada, Las Vegas (hereinafter "UNLV"), the then-President of that University, and the then-Members of the Board of Regents of that University, seeking, *inter alia*, to enjoin the enforcement of a sanction required of UNLV by the National Collegiate Athletic Association (hereinafter "NCAA").

On October 12, 1977, based upon a "STIPULATION OF FACTS" and brief testimony by the Plaintiff and four (4) other persons, Tarkanian successfully enjoined UNLV from carrying out the NCAA-mandated sanction, which sanction required of UNLV, the "complete severance of any and all relations Tarkanian may have, formally or informally, with the University's intercollegiate athletic program during the period [two years] of the University's probation, including, but not limited to, activities associated with administration, supervision, coaching, recruiting, athletic booster groups and public relations or fund-raising activities related to the University's athletic program." The University appealed.

On May 17, 1979, then-Chief Justice Mowbray of the Nevada Supreme Court reversed and remanded the matter for joinder of the NCAA in compliance with the Nevada Rules of Civil Procedure, Rule 19 (a), and to "serve the interest of judicial efficiency by precluding subsequent litigation. . . ." The NCAA had appeared as "amicus curiae" before the Supreme Court of the State of Nevada; the other four members of that Court had concurred with the Chief Justices's opinion and action.

Tarkanian filed a "SECOND AMENDED AND SUPPLEMENTAL COMPLAINT" on July 23, 1979; UNLV filed its "ANSWER TO SECOND AMENDED AND SUPPLEMENTAL COMPLAINT" on March 28, 1980; and

NCAA filed its "DEFENDANT NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ANSWER TO PLAINTIFF'S SECOND AMENDED AND SUPPLEMENTAL COMMPLAINT [sic]" on August 10, 1983. Numerous pretrial matters and disputes had to be resolved before the second trial could proceed, including NCAA's oral motion for a continuance.

The parties stipulated that the provisions of Rule 41(e) of the Nevada Rules of Civil Procedure were waived on May 11, 1982.

Trial of this present litigation commenced on June 11, 1984, and was concluded on June 22, 1984. What follows then, arises out of, and is the result of, this last (and hopefully final) trial.

FINDINGS OF FACT

1. The Plaintiff is a tenured professor at UNLV at an annual salary of $53,000.00 (approximate).

2. The Plaintiff is also the Head Basketball Coach at UNLV, for which he is annually paid (in lieu of his salary as a professor) $125,000, plus 10% of the net proceeds received by UNLV for participation in NCAA-authorized championship games, plus fees from basketball camps and clinics, product endorsements, and income realized from writing a newspaper column, speaking on a radio program entitled "THE JERRY TARKANIAN SHOW," and appearing on a television program bearing the same name.

3. The various sources of the Plaintiff's income as described in paragraph 2 of these FINDINGS OF FACT are entirely contingent on the Plaintiff's continued status as the Head Basketball Coach at UNLV.

4. The Plaintiff received approximately $1,600.00 for basketball clinics and camps and product endorsements during Calendar Year 1983, in addition to his $125,000 salary; no evidence was offered as to the exact amount of any other possible sources of income; the Plaintiff is "compensated" for his participation in the newspaper column, the radio talk show and the television show.

5. The Plaintiff has been a basketball coach for twenty-eight (28) consecutive years, and is the "winningest" active basketball coach at the present time.

6. The Defendant UNLV is a legal and corporate entity organized and existing under and by virtue of, Article II, Section 4 of the Constitution of the State of Nevada and the laws of the State of Nevada; this Defendant is a public institution of higher education, financed by the State of Nevada.

7. The Defendant UNLV has been engaged in fielding a major basketball team, within (and without) the membership of the NCAA; UNLV is, and has been, a member of NCAA.

8. The current President of UNLV and the current members of the Board of Regents, named as defendants in this action, appear *pro forma*, and are deemed to be represented by counsel for UNLV, and to have interests and contentions identical to those of UNLV.

9. Defendant NCAA is a "voluntary" association of some 1,000 institutions of higher education which "consent" to being bound by its constitution, by-laws and other so-called "legislation" (rules). [At the time of the acts of which Plaintiff complains, the NCAA's membership totalled approximately 850 members.]

10. At all times material to this action, the Defendant NCAA was, and is, predominant in the field of intercollegiate athletics, *e.g.*, NCAA does virtually all of the negotiating for its members with regard to television coverage, and supervises the payment to the membership of the many millions of dollars garnered from such coverage(s). In the words of the Chairman of the NCAA Committee (at the time the penalty against UNLV was imposed), "The NCAA is the only game in town."

11. NCAA "legislation" (rules) is set forth in an annual publication (hereinafter "The Manual"); references to "the Manual" will hereinafter refer to the 1976-1977 publication, unless specifically noted as being otherwise.

12. For some considerable period of time before February 26, 1976, NCAA conducted a preliminary investigation of UNLV and Tarkanian, vis-a-vis the Manual's requirements. ("Manual," in this context, refers to NCAA legislation dating back to at least as early as 1973.)

13. For the last twenty-four (24) months of this investigation, it was participated in, and supervised by, one Samuel David Berst, a then-Field Investigator for NCAA.

14. At all times material to this action, the same Samuel David Berst entertained actual bias and prejudice against the Plaintiff.

15. The same Samuel David Berst sought and obtained authority from the NCAA's Committee on Infractions to charge UNLV with violating NCAA legislation, *ie.*, an "Official Inquiry."

16. This same Samuel David Berst inspired, authored and drafted this Official Inquiry, in whole or in part.

17. On February 26, 1976, NCAA submitted this Official Inquiry to UNLV, which required UNLV to answer numerous questions, perhaps as many as 300, on or before June 1, 1976.

18. UNLV obtained an extension of time to so respond of 120 days.

19. On June 21, 1976, NCAA submitted a "Supplemental Official Inquiry" to UNLV, with more questions; this was also inspired, authored and drafted - in whole or in part - by the same Samuel David Berst.

20. The State of Nevada provided UNLV with the services of two lawyers from the Office of the Attorney General of the State of Nevada and UNLV also obtained the services of a lawyer engaged in the private practice of law, to assist in the formulation of UNLV's reponse to both inquiries from NCAA.

21. Despite numerous requests - written and oral - counsel for UNLV - and private counsel for the Plaintiff - were unable to obtain from NCAA (or any other persons) any information about the practices and procedures of the Committee on Infractions, before whom UNLV and the Plaintiff would have to appear to present responses.

22. These requests for information included, *inter alia*: (1) whether the proceedings would be reported (transcribed); (2) whether the sources of the NCAA's information would be provided to UNLV before any hearing; and generally rules regarding these possibly adversarial hearings, *e.g.*, who had the burden of proof and what that burden would be.

23. The policies and procedures of the Committee on Infractions, unbeknownst to UNLV or to the Plaintiff,

were not codified, but scattered throughout the minutes of the Committee in other infraction hearings involving other schools.

24. The minutes of the Committee were drafted - in whole or in part - by NCAA employees in the Enforcement Division, including the same Samuel David Berst.

25. The stated purpose of the NCAA's inquiries was to ensure that there would be two, independent investigations of the charges against UNLV and its basketball program.

26. UNLV (and the Plaintiff) were obliged by NCAA to provide the Enforcement Division's investigators the results of their investigation, despite the fact that the NCAA would not reciprocate.

27. There were three (3) adversarial hearings before the NCAA Committee on Infractions, viz: November 14, 1976; December 13 and 14, 1976; and March 13, 1977; the NCAA "could not afford" to bring before it any of the persons whose information formed the bases of the charges.

28. The Plaintiff was neither accompanied by, nor represented by, counsel at the first hearing, having been misled as to that right by NCAA.

29. The first two hearings conducted before the Committee on Infractions consisted of a comparison of the unsworn recollections of the NCAA investigators with the UNLV - and Plaintiff - supplied affidavits of persons who had been interviewed by Samuel David Berst (and others) of the NCAA.

30. The third hearing was conducted at the request of UNLV and the Plaintiff, to look into the integrity and

truthfulness of the NCAA investigators, in view of the diametrically-opposed recollections and affidavits.

31. In the event of a dispute, such as occurred in all three hearings, the members of the NCAA Committee on Infractions invariably and automatically found the recollections of their investigators to be accurate and truthful, and found the information disputing those recollections to be inaccurate and untruthful.

32. There were no standards or guidelines for the members of the Committee to use, *e.g.*, the burden of proof was variously considered by members to be a preponderance, proof beyond a reasonable doubt, or being "absolutely sure" of the truthfulness of the allegations resulting in "Findings," *i.e.*, findings that UNLV was guilty of the infractions claimed by NCAA investigators.

33. At least one member of the five-member Committee on Infractions had made up his mind against UNLV before any hearings took place.

34. On April 26, 1977, the NCAA Committee on Infractions issued its "Confidential Report," enumerating its numerous findings of UNLV infractions.

35. The "Confidential Report" set forth an order to UNLV to show cause why additional penalties should not be imposed on UNLV if it did not effect "complete severance of any and all relations Tarkanian may have, formally or informally, with the University's intercollegiate athletic program during the period [two (2) years] of the University's probation including, but not limited to, activities associated with administration, supervision, coaching, recruiting, athletic booster groups and public relations or fund-raising activities related to the University's athletic program."

36. On May 13, 1977 - consistent with the Manual - UNLV gave written notice of appeal of the findings and penalty of the Committee on Infractions to the NCAA Council.

37. Plaintiff and UNLV appeared before the Council for the administrative appeal; an "Expanded Confidential Report" consisting of the earlier "Confidential Report" and the University's response was presented to the Council.

38. The same Samuel David Berst inspired, authored and drafted - in whole or in part - this "Expanded Confidential Report."

39. The members of the Council (as was the case with members of the Committee) never disagreed with the "facts" given them by NCAA investigators, but sometimes disagreed to the extent that these "facts" did not amount to a violation of NCAA legislation.

40. After UNLV, the Plaintiff and their respective counsel had left the Council hearing, the Council invited the NCAA investigators to again appear, all without notice to UNLV or to the Plaintiff, to help "clarify" certain issues.

41. On August 25, 1977, NCAA notified UNLV of the Council's acceptance of the Committee on Infraction's numerous findings and its penalty.

42. On August 26, 1977, the NCAA issued a press release which included a summary of those findings and the penalty imposed.

43. On August 30, 1977, UNLV gave notice to Plaintiff of an administrative hearing to be held by UNLV to inquire into the necessity of complying with the NCAA - imposed penalty.

44. On September 6, 1977, this hearing was had before a hearing officer who believed that UNLV had three (3) choices, viz: (1) withdrawing from the NCAA or (2) severing Tarkanian from UNLV as dictated by the NCAA; contesting the NCAA's findings did not appear to be a viable third alternative to this hearing officer.

45. On September 7, 1977, Defendant UNLV gave written notice to the Plaintiff that UNLV was going to comply with the NCAA-dictated penalty, and further, that the severance would become effective on September 9, 1977.

46. Although the Court could *sua sponte* take judicial notice of the fact that the Plaintiff was represented by counsel at the second and third hearings before the Committee on Infractions, before the NCAA Council, before the trial court which initially heard the litigation between the Plaintiff and UNLV, and who represented the Plaintiff before the Supreme Court of the State of Nevada, and before this Court in the instant action, the sole mentions of attorneys' fees are in paragraph XXVI and in the prayer for relief in the "SECOND AMENDED AND SUPPLEMENTAL COMPLAINT;" further, not a single question was asked of any witness as to the extent or cost of attorney representation.

47. "THE SECOND AMENDED AND SUPPLEMENTAL COMPLAINT" seeks redress for the threatened deprivation of "property and liberty without procedural or substantive due process. . . ."

48. The Plaintiff did not seek redress against the Defendants, or any of them, on a theory of a wilful tort, *e.g.*, defamation or interference with the Plaintiff's contractual rights, except obliquely; no proof of damages, except as herein noted, was offered.

CONCLUSIONS OF LAW

1. The actions of the NCAA were (and are) "state action," for constitutional and jurisdictional purposes. *Justice v. NCAA,* 577 F.Supp. 356 (D. Ariz. 1983), *Associated Students, Inc. v. NCAA,* 493 F.2d 1251 (9th Cir. 1974).

2. Defendant NCAA's reliance on *Blum v. Yaretsky,* 102 S.Ct. 2777 (1982) is misplaced. Defendant UNLV is a public institution, and is State-funded.

3. Defendant UNLV's reliance on *Adams v. A.Q.H.A.,* 583 S.W. 2d 828 (Tex. Civ. App. 1979) is misplaced. Defendant NCAA did not, and has not, "heeded the bounds of reason, common sense and fairness and do not violate public policy or the law." Further, membership in the NCAA could hardly be called "voluntary." (See Paragraph 9, *supra.*)

4. Both the Defendant NCAA and the Defendant UNLV have deprived the Plaintiff Tarkanian of procedural due process, *i.e.,* the opportunity to be heard at a meaningful time and in a meaningful manner. *Mathews v. Eldridge,* 96 S.Ct. 893 (1976).

5. Both the Defendant NCAA and the Defendant UNLV have deprived the Plaintiff Tarkanian of substantive due process, *i.e.,* the guarantee that he will not be deprived of liberty or property for arbitrary reasons. *Allen v. State of Nev., Pub. Emp. Ret. Bd.,* 100 Nev. Adv. Op., No. 20 (1984); the decision by NCAA was arbitrary and capricious, and the decision of UNLV was vicariously so. *Jeffries v. Turkey Run Consolidated School District,* 492 F.2d 1 (7th Cir. 1974).

6. Immediate and irreparable harm that would come to the Plaintiff includes not only damage to his reputation, but also from a loss of income which is his due, and not a mere unilateral expectation of that income. *Paul v. Davis,* 96 S.Ct. 1155 (1976).

7. The immediate and irreparable harm with which the Plaintiff is threatened by the currently-enjoined acts of the Defendant NCAA and Defendant UNLV is the loss of both liberty and property interests which must be safeguarded. *Board of Regents of State Colleges v. Roth,* 92 S.Ct. 2701 (1972).

8. Membership in the NCAA bears a likeness to prohibited "adhesion contracts," *i.e.,* the three (3) factors of (1) substantive unfairness; (2) the relationship of NCAA and UNLV; and (3) the disparity of their respective bargaining powers seem to be present. *Bill Stremmel Motors v. IDS Leasing Corp.,* 89 Nev. 414, 514 P.2d 654 (1973); Annot. 86 A.L.R.3d 862, Annot. 18 A.L.R.3d 1305.

9. Plaintiff Tarkanian has no adequate remedy at law, inasmuch as the stigma attached to Plaintiff's name would be ineradicable.

10. Balancing the interests of Tarkanian, UNLV and the NCAA, one need look no further than the great span of time which has elapsed between the final decision of the NCAA (and the capitulation of UNLV) and the time that this trial commenced (and ended), without a single complaint about the delay from either the NCAA or UNLV.

11. Attorneys' fees must be not only alleged, as in this case, but proved as well; therefore, no attorneys' fees may be awarded.

OPINION

This case presents a clasic example of how misperception becomes suspicion, which in turn becomes hostility, which leads, inevitably, to a deprivation of one's rights. The Court speaks, of course, about how the view of Las Vegas, Nevada from Shawnee Mission, Kansas seems to have affected the earlier (and current) proceedings in this long-standing dispute.

The National Collegiate Athletic Association (NCAA) has evolved from the small, loose-knit association of schools envisioned by President Theodore Roosevelt in 1906 to a large bureaucracy with not only a permanent staff, but it also exercises a pervasive force throughout its 1,000-member association. In short, NCAA now seems to say: "If you want to play ball, you must join us, obey our rules and surrender *any* claim you may have under the Bill of Rights." This Court disagrees with that attitude, as any fair-minded person must.

University of Nevada, Las Vegas, (UNLV) carried out the real aim of the NCAA (severing Tarkanian), not out of respect for the NCAA's "Findings," but due to fear of the seemingly omnipotent Enforcement Division of NCAA. Despite the fact that the then-President of UNLV found that the "factual basis for the NCAA's charges and sanctions as they apply to Coach Tarkanian is clearly in doubt," UNLV felt that it was on the horns of a dilemma, *i.e.*, yield to the unjust actions of the NCAA or face being relegated to the position of a pariah in that association or to withdraw from the NCAA altogether.

The Official Procedure Govering the NCAA Enforcement Program (the Manual, at p. 116) provides, in pertinent part:

> Individuals employed by or associated with member institutions for the administration, the conduct or the coaching of intercollegiate athletics are, in the final analysis, teachers of young people. Their responsibility is an affirmative one and they must do more than avoid improper conduct or questionable acts. Their own moral values must be so certain and positive that those younger and more pliable will be influenced by a fine example. Much more is expected of them than of the less critically placed citizen.

It would seem that these fine sentiments should also apply to the "critically placed" investigators - and others - of the NCAA. Regrettably, both the full-time investigators and part-time Committee and Council members acted and thought not like Caesar's wife, but rather as arrogant lords of the manor. The language, apparently subscribed to by all of these NCAA personnel, to illustrate this arrogance, may be found in the Manual at page 118, the last sentence of Section 5 (urged on this Court by one of NCAA's many lawyers):

> Determinations of fact and violations arrived at in the foregoing manner by the Committee, or by the Council on appeal, shall be final, binding and conclusive, and shall not be subject to further review by the Council *or any other authority.* (Emphasis supplied.)

The members of the Committee on Infractions and the Council relied on the "integrity" of the permanent NCAA staff (including NCAA's investigators) and never accorded representatives of its members the common courtesy (and legal necessity) of providing a neutral

forum in which disputes regarding allegations of violations of NCAA "legislation" (rules) could be resolved. Even the NCAA's insistence on the use of the word "legislation," instead of, *e.g.*, "rules," gives us a glimpse of NCAA's view of itself and of its power.

At least one of NCAA's investigators (or employee of the Enforcement Division) inspired, authored and drafted - in whole or in part - the NCAA preliminary investigation; the authority to issue an inquiry to UNLV; the Official Inquiry; the minutes of the Committee on Infractions wherein the Committee's rules (*now* codified in the 1984-1985 Manual) appeared; the Confidential Report of that Committee; the Findings and penalty imposed by that Committee; the Expanded Confidential Report (with the Enforcement Division's comments) used by the Council on appeal; and the order of the Council and the widely-promulgated press release about the supposed violations of NCAA "legislation." These personnel also matched their unsworn and unwritten recollections against the sworn, written statements, of the same persons, offered by both Tarkanian and UNLV. These NCAA practices might be considered "efficient," but so was Adolph Eichmann and so is the Ayatollah.

A case in point will serve to illustrate the prejudice a Member (in this case, UNLV, of course) faces when challenged by the NCAA staff: NCAA investigators alleged (and "found") that Coach Tarkanian had, in violation of NCAA legislation, paid the air fare of one "Jeep" Kelly from his home to Las Vegas, Nevada. (Kelly was a player being recruited by Tarkanian.) Despite the facts that UNLV produced an affidavit from Kelly's high school coach, stating that *he* had paid for the ticket; UNLV and

Tarkanian produced a copy of the ticket; and the high school coach's cancelled check which showed the payment, the NCAA found Tarkanian "guilty" of this alleged infraction.

Not only were Tarkanian and UNLV set off on wild-goose chases because of NCAA's refusal to let them know what the rules of the hearings would be, but when Tarkanian or a representative of UNLV would telephone NCAA for some guidance, those telephone calls would be secretly taped, as that was NCAA "policy." Not only is such interception a felony in Nevada, and at least a Class A misdemeanor in Kansas, it also illustrates the duplicity of the permanent staff of NCAA. After all, just in 1984, a person in a position of trust in the Reagan Administration was found to be "unethical" for such practice, even though it may not have been illegal.

Three (3) members of the five-person Committee on Infractions testified, revealing, *inter alia,* the three (3) versions of the burden of proof set out in Finding of Fact No. 32, and the Chairman of the NCAA Council also testified and revealed, for the first time, that the fifteen (15)-member Council had delegated its determination to a committee of three (3) of its number. Neither Tarkanian nor UNLV was aware of this before Professor J. Neils Thompson testified. (Professor Thompson is a Professor of Civil Engineering at the University of Texas [since 1942]; he was also the chairman of the Council.)

The three Committee on Infractions' members who testified were: HARRY M. CROSS, a Professor of Law at the University of Washington (since 1943); WILLIAM A. MATTHEWS, Professor of Law at the University of Kentucky; ARTHUR R. REYNOLDS, a "Compliance Of-

ficer" with the GREELEY (Colo.) NATIONAL BANK (and the then-chairman of the Committee).

Some mention must be made about the treatment the judicial system has received from the NCAA:

ITEM: At the same time that the NCAA was hiding behind the conditional immunity afforded "voluntary" associations, the NCAA appeared as "amicus curiae" ("friend of the Court") in the lawsuit between Tarkanian and UNLV, before the Nevada Supreme Court.

ITEM: Notwithstanding the fact that the myriad number of NCAA lawyers were given notice that they had to abide by the practices and procedures of this Court and were on notice as to what those written, published practices and procedures are, they sought to get a continuance of the trial in a manner violative of those rules.

ITEM: Notwithstanding the fact that the NCAA expressed a desire, through counsel, to "amicably" resolve the dispute, counsel called as witnesses some persons whose testimony counsel himself doubted.

ITEM: The NCAA, incredibly, sought to equate "time" with "due process." The reasoning of the NCAA was, apparently, that since the Committee's and the Council's presentations and deliberations were time-consuming, Tarkanian and UNLV were afforded due process.

ITEM: Notwithstanding the fact that this Court admonished the NCAA for issuing daily press releases during the two-week trial, the NCAA chose to make a further release *after* it had been admonished not to try its case in the media.

In sum, what started out as an association whose members met and exceeded certain lofty goals, ended up as the NCAA-bureaucracy which looks upon its friends (sycophants) with feigned pleasure, and its enemies (those who still recognize the U.S. Constitution) with barely-concealed malevolence. The NCAA has numerous, very distinguished individuals on its various committees and its Council for public consumption, but the real power is in the hands of bureaucrats who are unknown to, and unelected by, the membership of the NCAA.

The NCAA is an association which exists for the purpose of seeing that there is fair play; it also has the obligation to play fairly.

ORDER AND JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the University of Nevada, Las Vegas, its President, Dr. Leonard Goodall and the members of the Board of Regents, Frankie Sue Del Papa, Lilly Fong, Dorothy Gallagher, Chris Karamanos, Joan Kenney, Daniel J. Klaich, John McBride, Joann Sherrin and June Whitely, and any persons or entity acting in concert or participation with these named defendants is restrained and enjoined from effectuating any mandate of the National Collegiate Athletic Association, *i.e.*, the severance (complete or otherwise) of any and all relations [Plaintiff] Tarkanian may have, formally or informally, with the University's intercollegiate program . . . including, but not limited to, activities associated with the administration, supervision, coaching, recruiting, athletic booster groups, and public relations or fund-raising activities related to the University's athletic program.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant University and its President and the members of its Board of Regents and any persons or entities, its officers agents, servants, employees and attorneys acting in concert are further restrained and enjoined from enforcing any provisions of Confidential Report No. 123 (47) [Case No. 443, University of Nevada, Las Vegas]);

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendant National Collegiate Athletic Association and any persons or entities, its officers, agents, servants, employees and attorneys acting in concert are restrained and enjoined from any further proceedings against the University of Nevada, Las Vegas, and more particularly, requiring that the University show cause why it should not carry out the mandate of the defendant, National Collegiate Athletic Association;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the National Collegiate Athletic Association and any persons or entities, its officers, agents, servants, employees and attorneys acting in concert are restrained and enjoined from compelling the University to comply with the terms of Confidential Report No. 123 (47) [Case No. 443, University of Nevada, Las Vegas]);

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the National Collegiate Athletic Association and any persons or entities, its officers, agents, servants, employees and attorneys acting in concert should take no action with regard to the University of Nevada, Las Vegas with regard to this Confidential Report;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the injunctions herein-above imposed upon

the defendants, and each of them, and any persons or entities or their respective officers, agents, servants, employees and attorneys acting in concert with them, is made permanent.

DATED AND DONE THIS 25th day of June, 1984.

/s/ Paul S. Goldman
Paul S. Goldman
District Judge

(Filed January 21, 1985)

CASE NO. A 173498
DEPT. NO. X
CIVIL DOCKET K

IN THE
EIGHTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF CLARK

JERRY TARKANIAN,
Plaintiff,

vs.

UNIVERSITY OF NEVADA, UNIVERSITY OF NEVADA, LAS VEGAS, DR. LEONARD GOODALL, as President of the University of Nevada, Las Vegas, and Officer of the University of Nevada; and FRANKIE SUE DEL PAPA, LILLY FONG, DOROTHY GALLAGHER, CHRIS KARAMANOS, JOAN KENNEY, DANIEL J. KLAICH, JOHN McBRIDE, JOANN SHERRIN and JUNE WHITELY, as Members of the Board of Regents of the University of Nevada; and the NATIONAL COLLEGIATE ATHLETIC ASSOCIATION an unincorporated association,
Defendants.

NOTICE OF ENTRY OF ORDER AND FINDINGS OF FACT AND CONCLUSIONS OF LAW

TO: Defendant NCAA, and DAVID GOLDWATER, ESQ., its Attorney; and

TO: Defendants UNIVERSITY OF NEVADA, *et al.*; and to GARY GOODHEART, ESQ., Attorney for all Defendants Except NCAA:

PLEASE TAKE NOTICE that the Court's FINDINGS OF FACT AND CONCLUSIONS OF LAW and ORDER were entered on the 21st day of January, 1985, in the above-entitled action, true and correct copies of which are attached hereto.

Lionel Sawyer & Collins
By: /s/ Mark A. Solomon
Samuel S. Lionel, Esq.
Mark A. Solomon, Esq.
1700 Valley Bank Plaza
300 South Fourth Street
Las Vegas, Nevada 89101
Attorneys for Plaintiff

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

1. Plaintiff, Jerry Tarkanian, Head Basketball Coach for the University of Nevada, Las Vegas commenced this action on September 8, 1977 against The University of Nevada, The University of Nevada, Las Vegas, the then President of University of Nevada, Las Vegas, and an Officer of the University of Nevada, and members of the Board of Regents of the University of Nevada seeking to vindicate his civil rights by enjoining those defendants from carrying out the National Collegiate Athletic Association's mandate to suspend plaintiff from his coaching position at University of Nevada, Las Vegas for a period of two years.

2. The first trial of this action commenced on October 12, 1977 and culminated with plaintiff Tarkanian ob-

taining a permanent injunction prohibiting those defendants from suspending plaintiff from his coaching position.

3. After the Nevada Supreme Court reversed and remanded the matter for joinder of the NCAA as a party-defendant, plaintiff filed a Second Amended And Supplemental Complaint on July 23, 1979 alleging facts sufficient to state a claim for relief under 42 U.S.C. §1983. At all times since September 8, 1977 all defendants knew that plaintiff commenced this action under 42 U.S.C. §1983.

4. After numerous pretrial matters and disputes were resolved, including the NCAA's oral motion for a continuance, the second trial of this matter commenced on June 11, 1984 after the then current President of the University of Nevada, Las Vegas and Members of the Board of Regents of the University of Nevada were substituted as defendants for their respective predecessors. Hereinafter all defendants other than the NCAA shall be collectively referred to as "UNLV".

5. On June 25, 1984 the Court entered its Preliminary Statement, Findings Of Fact, Conclusions Of Law, Opinion, Order And Judgment ("Ruling") and held that the action of defendants NCAA and UNLV constituted state action and deprived plaintiff Tarkanian of his rights to procedural and substantive due process under the United States Constitution. The Court issued a permanent injunction prohibiting defendants from carrying out the NCAA's mandate to suspend plaintiff from his coaching position at UNLV.

6. In its Ruling, the Court also denied plaintiff attorney's fees as damages.

7. On June 26, 1984 plaintiff filed a Memorandum of Costs And Disbursements ("Costs Memorandum").

8. Both the affidavit of plaintiff's counsel, Mark A. Solomon of Lionel Sawyer & Collins, and the detailed attorney time records appended to plaintiff's Cost Memorandum demonstrated that through June 22, 1984 plaintiff incurred $168,364.70 in attorney's fees and $2,814.22 in costs in connection with this litigation.

9. On June 29, 1984, defendant UNLV filed a Motion To Retax And Settle Costs; and on that same date, defendant NCAA also filed a Motion To Retax And Settle Costs.

10. On July 17, 1984, the date set for hearing of defendants' motions to retax and settle costs, defendant NCAA filed a Petition For Removal to the United States District Court, District of Nevada.

11. On November 15, 1984 the United States District Court, District of Nevada remanded this case to this Court.

12. On December 4, 1984 the Court heard oral argument on defendants' motions to retax and settle costs and ordered further briefing.

13. On January 11, 1985 plaintiff filed Supplemental Points And Authorities In Opposition To Motion To Retax And Settle Costs ("Supplemental Opposition") in which he requested an additional $19,773.00 in attorney's fees for services performed from June 23, 1984 through January 10, 1985. Plaintiff attached thereto detailed attorney time records covering that period and substantiating the services performed and fees charged.

14. Also attached to plaintiff's Supplemental Opposition is an affidavit by the Legal Administrator of Lionel Sawyer & Collins, Mary Ann Kennington, which states the results of a June, 1984 survey conducted by the

then President of the Las Vegas Chapter of the Association of Legal Administrators on prevailing market rates for attorney services in Las Vegas, Nevada.

15. With the exception of a conclusionary affidavit without foundation submitted by the NCAA's counsel, David Goldwater, to the effect that the fees sought by Lionel Sawyer & Collins exceeded prevailing market rates, neither the NCAA nor UNLV presented any evidence challenging the accuracy or reasonableness of the hours and rates charged and services provided by plaintiff's counsel as detailed in the attorney time records submitted to the Court on June 26, 1984 and January 11, 1985.

16. The Court is well familiar with counsel for plaintiff, their work product and preparation during the course of this litigation, and the rates charged for similar services by attorneys and paralegals of comparable experience, reputation and skill in Las Vegas, Nevada.

17. The Court has read the entire file in this action and observed plaintiff's counsel during all pretrial, trial and post-trial matters before this Court and believes that the quality of services rendered by plaintiff's counsel met the standards of professional excellence.

18. This case presented complicated and novel issues of fact and law, particularly civil rights law, and plaintiff obtained virtually all the relief requested in his Second Amended And Supplemental Complaint.

19. Defendant NCAA initiated and controlled the proceedings which led to plaintiff Tarkanian's suspension. In suspending plaintiff from his coaching position, UNLV was in large part responding to the mandate of the NCAA which has been intimately involved in this action from its inception.

20. If any of these findings of fact are more properly conclusions of law, they shall be so deemed.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over this matter by virtue of the United States District Court's remand of this action on November 15, 1984.

2. Plaintiff is a prevailing party under 42 U.S.C. §1983 and is entitled to an award of costs and attorney's fees pursuant to N.R.S. 18.005 et seq. and 42 U.S.C. §1988.

3. Plaintiff has presented the Court with clear and convincing evidence regarding the services performed, the rates charged and the hours worked by his counsel on this litigation.

4. The services performed, hours worked and rates charged by plaintiff's counsel as detailed in the attorney time summaries submitted to the Court on June 26, 1984 and January 11, 1985 are reasonable.

5. Pursuant to the evidence presented by plaintiff and the Court's own experience, the Court is satisfied that the rates charged by plaintiff's counsel are reasonable and in line with the rates charged in Las Vegas, Nevada, for similar services by attorneys and paralegals of comparable skill, experience and reputation.

6. Pursuant to N.R.S. 18.005 et seq. and 42 U.S.C. §1988 plaintiff Tarkanian is entitled to an award of costs including attorney's fees in the amount of $195,951.92.

7. The award of costs and attorney's fees shall be apportioned among the defendants as follows: (1) defendant NCAA shall be assessed and shall pay to plaintiff

90% of the award, and (2) defendant UNLV shall be assessed and shall pay to plaintiff 10% of the award.

8. If any of these conclusions of law are more properly findings of fact, they shall be so deemed.

DATED this 21 day of January, 1985.

/s/ Paul S. Goldman
District Judge

SUBMITTED BY:

Lionel Sawyer & Collins
By: /s/ Mark A. Solomon
Samuel S. Lionel, Esq.
Mark A. Solomon, Esq.
1700 Valley Bank Plaza
300 South Fourth Street
Las Vegas, Nevada 89101
Attorneys for Plaintiff

ORDER

This matter came before the Court for hearing pursuant to defendant National Collegiate Athletic Association's (hereinafter "NCAA") Motion To Retax And Settle Costs filed June 29, 1984 and defendants University of Nevada, et al.'s (hereinafter collectively "UNLV") Motion To Retax And Settle Costs filed June 29, 1984, Lionel Sawyer & Collins representing plaintiff Tarkanian, Jones, Jones, Bell, Close & Brown representing defendants UNLV, and David Goldwater, Ltd. and Swanson Midgley, Gangwere, Clarke & Kitchin representing defendant NCAA, and the Court having considered all moving and opposition papers, and the Court having made its Findings Of

Fact And Conclusions Of Law, hereby makes its orders as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT defendants' motions to retax and settle costs be, and the same are hereby denied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that pursuant to N.R.S. 18.005 et seq. and 42 U.S.C. §1988 plaintiff is awarded the amount of $195,951.92 as costs including attorney's fees.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the award of costs including attorney's fees shall be apportioned among defendants as follows: (1) defendant NCAA shall be assessed and shall pay to plaintiff the amount of $176,356.73, which is equal to 90% of the award; and (2) defendant UNLV shall be assessed and shall pay to plaintiff the amount of $19,595.19, which is equal to 10% of the award.

DATED this 21st day of Jan., 1985.

/s/ Paul S. Goldman
District Judge

SUBMITTED BY:

Lionel Sawyer & Collins
By: /s/ Mark A. Solomon
Samuel S. Lionel, Esq.
Mark A. Solomon, Esq.
1700 Valley Bank Plaza
300 South Fourth Street
Las Vegas, Nevada 89101
Attorneys for Plaintiff

RECEIPT OF COPY

RECEIPT OF COPY of the above NOTICE OF ENTRY OF ORDER AND FINDINGS OF FACT AND CONCLUSIONS OF LAW is hereby acknowledged this 21st day of January, 1985.

David Goldwater, Esq.
By: /s/ David Goldwater
David Goldwater, Esq.
302 E. Carson, #1000
Las Vegas, Nevada 89101
Attorneys for Defendant NCAA

DATED this 21 day of January, 1985.

Jones, Jones, Close & Brown
Chartered
By: /s/ Gary R. Goodheart
Gary R. Goodheart, Esq.
300 South Fourth Street, #700
Las Vegas, Nevada 89101
Attorneys for all Defendants
Except NCAA

(Filed August 27, 1987)

IN THE
SUPREME COURT OF THE STATE OF NEVADA

No. 16256

JERRY TARKANIAN, UNIVERSITY OF NEVADA, LAS VEGAS; DR. LEONARD GOODALL, as President of the University of Nevada, Las Vegas and Officer of the University of Nevada; FRANKIE SUE DEL PAPA, LILLY FONG, DOROTHY GALLAGHER, CHRIS KARAMANOS, JOAN DENNEY, DANIEL J. KLAICH, JOHN McBRIDE, JOANN SHEERIN and JUNE WHITELY as Members of the Board of Regents of the University of Nevada,
Appellants and Cross-Respondents.

vs.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Respondent and Cross-Appellant.

Appeal from injunction prohibiting suspension of Jerry Tarkanian as UNLV Basketball Coach; cross-appeal from denial of attorney's fees as damages; appeal from order granting attorney's fees as costs pursuant to 42 U.S.C. § 1988. Eighth Judicial District Court, Clark County; Paul S. Goldman, District Judge.

Reversed in part, affirmed in part, remanded.

OPINION

PER CURIAM:

This is the second appeal in litigation involving Jerry Tarkanian's suspension as head basketball coach at the

University of Nevada-Las Vegas (UNLV). The trial court granted Tarkanian injunctive relief because of the NCAA's failure to comply with due process standards. The trial court also awarded Tarkanian attorney's fees pursuant to 42 U.S.C. § 1988. We affirm in most respects, reversing and remanding only for recomputation of attorney's fees.

THE FACTS

The NCAA is a private, voluntary association consisting of approximately 960 public and private educational institutions. The NCAA Council, which is elected at annual conventions, is responsible for implementation and interpretation of NCAA policies. The NCAA Committee on Infractions administers the NCAA enforcement program.

UNLV is a public university existing by virtue of Article 11, Section 4 of the Nevada Constitution. Jerry Tarkanian has been a head basketball coach for nearly thirty years, at UNLV since 1973.

After a two and one-half year investigation of UNLV's basketball program, the Committee on Infractions issued to UNLV an Official Inquiry on February 25, 1976. The Official Inquiry was fifty-four pages in length and outlined seventy-two rule violations which allegedly occurred between 1970 and 1976. The Official Inquiry was later supplemented with six additional allegations. UNLV was requested to conduct its own investigation and respond by June 1, 1976. The Nevada State Attorney General's Office conducted an extensive investigation of the allegations. The individuals named in the Official Inquiry were located, and attorney general personnel either traveled to their homes or flew them to Las Vegas for interviews.

UNLV submitted to the Committee on Infractions a response consisting of a restatement of each allegation and an explanation whether UNLV agreed that a violation occurred. UNLV also submitted two boxes of sworn statements, affidavits and other documentary evidence supporting denials of rule violations.

The Committee on Infractions considered the allegations in hearings covering approximately a three-day period. The NCAA enforcement staff's evidence consisted of the investigators' oral recollections of interviews with sources. The investigators relied on memoranda of the interviews, sometimes dictated after the interviews. The interviewees did not check the accuracy of the memoranda. With respect to the allegations against Tarkanian, UNLV affidavits and sworn statements directly controverted the testimony of the NCAA enforcement staff.

Of the seventy-eight allegations, the Committee found thirty-eight violations of NCAA rules. Tarkanian was named in ten of the violations. The Committee issued its findings in Confidential Report No. 123(47), which directed UNLV to show cause why additional penalties should not be imposed against it if it did not suspend Tarkanian from involvement with the University's Intercollegiate Athletic Program for two years.

UNLV appealed certain findings and penalties to the NCAA Council in May, 1977, including all involving Tarkanian. The Council affirmed the findings and penalties of the Committee on August 23, 1977. In September, 1977, UNLV conducted a hearing to determine whether to follow the NCAA's directive. The hearing officer questioned the factual basis of the charges against Tarkanian, but felt UNLV had no choice but to accept the penalties

in the Confidential Report. UNLV's President accepted the hearing officer's recommendation and suspended Tarkanian.

Tarkanian brought suit against UNLV in September, 1977 and obtained injunctive relief. This court reversed for failure to join a necessary party, the NCAA. University of Nevada v. Tarkanian, 95 Nev. 389, 594 P.2d 1159 (1979). Tarkanian commenced a second suit in July, 1979, against both UNLV and the NCAA. The trial court granted Tarkanian injunctive relief but denied Tarkanian's claim for attorney's fees as damages under state law. The trial court, however, did allow attorney's fees as costs pursuant to 42 U.S.C. § 1988.

DISCUSSION

State Action.

The NCAA first contends that UNLV's and the NCAA's imposition of penalties against Tarkanian does not constitute state action.

Due process restrictions apply only to activities which can be characterized as state action.[1] Early cases held that NCAA regulatory activity constituted state action. *See, e.g.*, Regents of the Univ. of Minn. v. N.C.A.A., 560 F.2d 352 (8th Cir. 1977), *cert. denied*, 434 U.S. 978 (1977); Howard University v. N.C.A.A., 510 F.2d 213 (D.C. Cir. 1975); Parish v. N.C.A.A., 506 F.2d 1028 (5th Cir. 1975); Associated Students, Inc. v. N.C.A.A., 493 F.2d 1251 (9th Cir. 1974). The rationale underlying these cases was that

1. The "under color of law" requirement of 42 U.S.C. § 1983 is identical to the state action requirement of the Fourteenth Amendment. Rendell-Baker v. Kohn, 457 U.S. 830, 838 (1982). The parties use both terms, but for convenience' sake, we will refer only to state action.

many NCAA member institutions were either public or government supported. Rivas Tenorio v. Liga Atletica Interuniversitaria, 554 F.2d 492, 495 (1st Cir. 1977). However, the NCAA argues that a trilogy of 1982 Supreme Court decisions and cases subsequently interpreting them require a different result. We disagree.

The Supreme Court cases on which the NCAA relies are Rendell-Baker v. Kohn, 457 U.S. 830 (1982), Lugar v. Edmondson Oil Company, Inc., 457 U.S. 922 (1982), and Blum v. Yaretsky, 457 U.S. 991 (1982).

In *Blum*, medicaid patients in private nursing homes challenged the decision of physicians to transfer them to lower levels of care without notice or a hearing. 457 U.S. at 1006. The Court held that due process limitations did not apply because government regulations did not dictate the decision to transfer. Rather, private physicians determined whether the patient's care was medically necessary based upon professional standards. *Id.* at 1006-08. The Court stated that "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Id.* at 1004. The Court further noted that mere regulation, subsidization, or acquiescence in the initiatives of a private party do not create state action. *Id.*

In *Rendell-Baker*, the Court relied upon similar reasoning to hold that a private high school for maladjusted students did not act under color of law when it discharged teachers. The Court reached this conclusion even though the school was governmentally regulated and received most of its students by referral from public schools, and public

funds had accounted for over ninety percent of its budget. 457 U.S. at 832-33.

In *Lugar*, the Court determined that a private party's joint participation with state officials in the seizure of disputed property constituted action under color of state law. The Court interpreted its cases to require "that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State." 457 U.S. at 937. This inquiry contains a two-part approach:

> First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.

Id. at 937.

Cases subsequent to *Blum*, *Rendell-Baker*, and *Lugar* have rejected the earlier line of cases which held that NCAA regulatory activity is state action. In Arlosoroff v. N.C.A.A., 746 F.2d 1019 (4th Cir. 1984), a Duke University tennis player challenged NCAA eligibility requirements. In holding that the state action requirement was not met, the court said that it could not be shown that state schools joined as a bloc to cause the bylaw in question to be adopted. Thus the coercive power test explained in *Blum* was not met, and the court found no state action. 746 F.2d at 1022. *Arlosoroff* specifically rejected the earlier line of cases which held that NCAA regulatory activity is state action. *Id.* at 1021. *See also* Graham v. N.C.A.A., 804 F.2d 953 (6th Cir. 1986); Ponce v. Basketball Federation, 760 F.2d 375 (1st Cir. 1985); McHale v. Cornell Univ., 620 F. Supp. 67 (N.D.N.Y. 1985).

The *Blum* trilogy and cases subsequently interpreting it do not require the result which the N.C.A.A. urges. Both *Blum* and *Rendell-Baker* recognized that state action may be present "if the private entity has exercised powers that are 'traditionally the exclusive prerogative of the state.'" *Blum*, 457 U.S. at 1005 (quoting Jackson v. Metropolitan Edison Co., 419 U.S. at 345, 353 (1974)); *see also Rendell-Baker*, 457 U.S. at 842. UNLV is a public institution, existing by virtue of Article 11, section 4 of the Nevada Constitution. Tarkanian is therefore a public employee. In our view, the right to discipline public employees is traditionally the exclusive prerogative of the state. UNLV cannot escape responsibility for disciplinary action against employees by delegating that duty to a private entity.

The *Arlosoroff* court held that the regulation of intercollegiate athletics is not a function traditionally exclusively reserved to the state. *See also Rendell-Baker*, 457 U.S. at 842 (while education is a public function, it has not been traditionally the exclusive function of the state). However, the facts of the instant case are distinguishable from *Arlosoroff* and other cases cited by the NCAA in that those cases concerned private schools. *See Arlosoroff*, 746 F.2d 1019 (applicability of NCAA eligibility requirements to Duke University tennis player); *McHale*, 620 F. Supp. 67 (applicability of NCAA eligibility requirements to Cornell University student). Graham v. National Collegiate Athletic Ass'n, 804 F.2d 953 (6th Cir. 1986), on which the NCAA relies in its supplemental points and

authorities, is also distinguishable. *Graham* did not deal with the enforcement of NCAA rules against a state employee, as in the instant case.

For similar reasons, the two-part approach articulated in *Lugar* requires that we conclude state action is present. The first prong is met because no third party could impose disciplinary sanctions upon a state university employee unless the third party received the right or privilege from the university. Thus, the deprivation which Tarkanian alleges is caused by the exercise of a right or privilege created by the state. Also, in the instant case, both UNLV and the NCAA must be considered state actors. By delegating authority to the NCAA over athletic personnel decisions and by imposing the NCAA sanctions against Tarkanian, UNLV acted jointly with the NCAA.

Property or Liberty Interest.

The protections of due process attach only to deprivations of property or liberty interests. Sullivan v. Brown, 544 F.2d 279, 282 (6th Cir. 1976). The NCAA argues that Tarkanian did not possess a constitutionally protected property or liberty interest. We disagree.

In Board of Regents v. Roth, 408 U.S. 564, 577 (1972), the Supreme Court stated that property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." A contract for employment can be the basis of a property right. Stewart v. Bailey, 556 F.2d 281, 285 (5th Cir. 1977).

In our view, Tarkanian's contractual relationship with UNLV establishes a property interest in continued employment. Since July, 1973, Tarkanian had been employed under a series of one-year contracts running from July through June. His 1977-1978 contract was entitled "Tenured Professional Employment Document." This contract, which was dated June 20, 1977 and was for a term running from July 1, 1977 through June of 1978, was a continuation of an established practice between the parties. The contract granted Tarkanian tenure, thus confirming his testimony that upon arrival at UNLV he was promised tenure would be given at some time in the future. This contract was in force when UNLV suspended Tarkanian in September, 1977.

The NCAA argues that Tarkanian was not deprived of a property interest because the suspension affected only his duties as head coach. According to his 1977-1978 contract, Tarkanian held the positions of both head basketball coach and professor of physical education. Case law supports that employees do not have a property interest in a particular position. *See e.g.,* Childers v. Independent School Dist. No. 1, 676 F.2d 1338, 1341 (10th Cir. 1982); Sullivan v. Brown, 544 F.2d 279, 282 (6th Cir. 1976). Given the facts of this case, this argument is not persuasive. Tarkanian had been a head basketball coach for twenty-eight years, four at UNLV. Continued employment only as a professor of physical education would be a drastic change from his previous assignment.

We also believe that Tarkanian possessed a liberty interest protected by the due process clause. The Supreme Court defined the parameters of the due process liberty interest in *Paul v. Davis,* 424 U.S. 693, *reh'g de-*

nied, 425 U.S. 985 (1976). In *Davis,* the Court held that in order to invoke the protections of the due process liberty interest, a plaintiff must show that a "right or status previously recognized by state law was distinctly altered or extinguished" and that his reputation was injured as a result. *Id.* at 711. This test has become known as the "stigma-plus" test, the stigma being an injury to reputation, the plus being a change in a previously recognized status. The NCAA is unpersuasive in contending that Tarkanian fails both prongs of the test.

The stigma which satisfies the "stigma-plus" test in the employment context must be such that it forecloses plaintiff's opportunity to take advantage of other employment opportunities. Altman v. Hurst, 734 F.2d 1240, 1243 (7th Cir. 1984), *cert. denied,* 469 U.S. 982 (1984); Bollow v. Federal Reserve Bank, 650 F.2d 1093, 1101 (9th Cir. 1981), *cert. denied,* 455 U.S. 948 (1982). Dismissal from employment on grounds involving immorality or dishonesty satisfies the stigma prong of the stigma-plus test. Lawson v. Sheriff, 725 F.2d 1136, 1139 (7th Cir. 1984). The grounds for suspending Tarkanian satisfy this standard.[2]

The NCAA also contends that Tarkanian has not suffered a sufficient change of status. As already noted, however, even though Tarkanian would have retained employment as a professor, the NCAA's disciplinary action

2. The NCAA's findings against Tarkanian included that (1) he arranged for a student to get a "B" grade without attending class or doing class work; (2) he attempted to impede the NCAA's investigation by discouraging individuals from providing information and encouraging individuals to provide false information; (3) he provided free airline transportation to a student-athlete; (4) he reimbursed an individual's expenses for recruiting a student-athlete; (5) he falsely certified UNLV's program as in compliance with NCAA rules; and (6) his conduct did not comport with high ethical standards.

would have drastically altered his position. *Cf.* Hardiman v. Jefferson County Bd. of Educ., 709 F.2d 635 (11th Cir. 1983) (one week suspension without pay insufficient to invoke due process protections); Mosrie v. Barry, 718 F.2d 1151 (D.C. Cir. 1983) (lateral transfer to less desirable district insufficient to invoke due process protections). Absent judicial intervention, Tarkanian's suspension might well have ended his college coaching career.

Due Process.

The NCAA contends that the trial court erred in finding that the manner in which Tarkanian was suspended did not afford due process of law. We disagree.

In the hearings before the Committee on Infractions, the NCAA enforcement staff presented orally the NCAA's case. The investigators' presentation consisted of their recollections of interviews with sources. The investigators relied upon notes of the interviews, sometimes dictated after the fact. Tarkanian and UNLV hotly contested virtually all of the testimony which allegedly established rule violations by Tarkanian, and they presented evidence directly contradicting the investigators' testimony, generally consisting of signed affidavits and statements from persons whom the NCAA had interviewed. In the circumstances of this case, this procedure does not comport with due process requirements.

Procedural due process requirements are flexible and vary as the particular situation demands. Mathews v. Eldridge, 424 U.S. 319, 334 (1976). In *Mathews,* the Court held that three competing interests should be balanced in determining what process is due:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.

A case on point is Stanley v. Big Eight Conference, 463 F. Supp. 920 (W.D. Mo. 1978). In *Stanley,* the plaintiff sought to enjoin the Big Eight Conference, working in cooperation with the NCAA, from conducting a hearing to determine if Oklahoma State University athletic personnel had violated rules of the Conference and the NCAA. The court granted injunctive relief.

In *Stanley,* the court noted the severe impact on coaching personnel when they are found to have violated the rules governing their activities. *Id.* at 926-27, 930. We have already discussed this point in the context of Tarkanian's liberty or property interest and will not repeat it here. We only reiterate our view that Tarkanian's suspension likely would have ended his near thirty-year career as a head coach and permanently tarnished his reputation. He no doubt possessed a significant interest in the outcome of the NCAA proceedings, an interest which cannot be taken lightly.

We next consider the nature of the fact-finding procedures employed by the NCAA. In *Stanley,* the fact-finding body intended to rely upon as evidence of wrongdoing an investigator's eighteen page report detailing in-

terviews with approximately seventy-five people. *Id.* at 924. The court held the procedures to be unconstitutional, stating:

> Of greatest concern to the Court is that the author of the investigative report is free to draw certain inferences beyond those statements of fact made to him in his interviews.
>
> . . . .
>
> . . . Furthermore, the author of the report presents statements made to him in a fashion that may not necessarily be prejudicial or biased but may certainly be classified as not completely neutral. It is this unconscious subjective coloring of the statements that troubles the Court. Accurate findings of fact should not be made upon pre-digested information.

Id. at 931.

There are significant similarities between this case and *Stanley,* and we are persuaded by *Stanley's* reasoning. *Stanley* involved a substantial investigation, with seventy-five people interviewed. The NCAA's investigation of Tarkanian and UNLV spanned approximately a two and one-half year period and resulted in fifty-eight pages of typed material detailing seventy-eight allegations of infractions. Also, in *Stanley,* the plaintiff denied the allegations pertaining to him. In the instant case, Tarkanian not only denied the allegations, he produced numerous sworn statements directly contradicting the testimony of the NCAA's investigators. In these circumstances, basing findings of fact upon pre-digested information creates serious due process problems. The lengthy and far-reaching scope of the NCAA's investigation in this case creates the danger that the enforcement staff may

not remember the precise nature of interviews. This increases the likelihood that investigators, no matter how pure their intentions, will gloss their testimony with an "unconscious subjective coloring." Also, despite the NCAA's desire to make the investigation a cooperative effort, the proceedings obviously became adversarial. Again, this enhances the likelihood that pre-digested information will be presented in a fashion favorable to the investigator-witness's position. As the court noted in *Stanley*, "[f]ew investigative reports can be written in a totally objective manner void of the author's subjective attitudes." *Id.* at 931 n.4.

Alternative procedures for protecting Tarkanian's interest are available. At a minimum the NCAA should be required to produce written affidavits of persons interviewed by the enforcement staff. This would attenuate the problem of a "subjective coloring" of the facts.

Attorney's fees.

The NCAA next argues that the trial court erred in awarding attorney's fees pursuant to 42 U.S.C. § 1988 (1982). Section 1988 allows the court in its discretion to award a party prevailing in a 42 U.S.C. § 1983 (1982) action a reasonable attorney's fee as a part of the costs. The NCAA argues that Tarkanian pleaded only in his complaint violations of the Fourteenth Amendment, without mentioning § 1983, and therefore cannot recover attorney's fees pursuant to § 1988. We disagree.

A cause of action under § 1983 requires an allegation that someone deprived the plaintiff of a federal right under color of state law. Gomez v. Toledo, 446 U.S. 635, 638 (1980). Tarkanian's complaint met these criteria, even

though his complaint did not mention § 1983. This is a sufficient basis for obtaining attorney's fees. *See* Kirchberg v. Feenstra, 708 F.2d 991, 1000 (5th Cir. 1983); Harradine v. Board of Supervisors, 425 N.Y.S.2d 182, 188 (App. Div. 1980) (plaintiff may recover attorney's fees pursuant to § 1988 in a state court action which does not allege violation of § 1983, but seeks to enforce federal rights).

The NCAA also contends that the trial court erred by awarding attorney's fees for claims upon which Tarkanian did not prevail. Tarkanian's complaint sought redress for violation of both First and Fourteenth Amendment rights. Because the trial court made findings only on violation of Tarkanian's Fourteenth Amendment rights, the NCAA argues that he did not prevail on his First Amendment claim and the attorney's fees award should be reduced proportionately. We disagree. Tarkanian's claims for relief are not so easily separated. Both involve a common core of facts and are based on closely related legal theories. Moreover, Tarkanian obtained all the relief he hoped to obtain. *See* Hensley v. Eckerhart, 461 U.S. 424, 440 (1983) ("Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised.").

The NCAA next asserts that the trial court erred by awarding attorney's fees for a phase of the litigation in which Tarkanian did not prevail. We agree. Tarkanian initially sued only UNLV. On appeal, this court reversed Tarkanian's favorable judgment for failure to join a necessary party, the NCAA. University of Nevada v. Tarkanian, 95 Nev. 389, 594 P.2d 1159 (1979). Nonetheless

the trial court awarded attorney's fees against the NCAA in favor of Tarkanian for fees expended during the first trial.

Section 1988 allows recovery of fees only to a prevailing party. In our view, the first trial is a distinct phase of this litigation in which Tarkanian did not prevail. *See* Doulin v. White, 549 F. Supp. 152 (E.D. Ark. 1982). The district court erred in awarding fees to Tarkanian for that phase of this litigation. On remand, the trial court shall reduce attorney's fees accordingly.

The trial court also awarded Tarkanian an additional $5,000.00 in fees that was not supported by the billing records submitted. Because there was no evidence to support this amount, it shall likewise be eliminated.

Tarkanian submitted detailed records to establish attorney's fees, and except as noted, the trial court did not abuse its discretion in fixing the amount of fees awarded. Because some attorney's fees were appropriate pursuant to § 1988, it is unnecessary to consider Tarkanian's cross-appeal for fees as damages under state law.

Testimony of Charles Alan Wright.

The NCAA contends on appeal that the trial court erred in refusing to grant a continuance in order to allow Charles Alan Wright to testify. The NCAA also asserts that the trial court should have admitted a transcript of Mr. Wright's prior testimony before a congressional sub-committee. Mr. Wright is a noted law professor and was a member of the Committee on Infractions. The NCAA argues that the trial court's failure to allow his testimony warrants reversal. We reject the NCAA's argument. Three members of the Committee on Infractions

testified at trial, two of whom were law professors. In these circumstances, even if the trial court did err, we fail to see how the NCAA was prejudiced.

The Trial Court Injunction.

Finally the NCAA argues that the trial court's order granting injunctive relief is overly broad. We agree that the order does contain some confusing language. We are certain, however, that the trial court intended only to prohibit enforcement of the penalties imposed upon Tarkanian in Confidential Report No. 123(47) and UNLV's adoption of those penalties. To the extent the trial court's order may be given a broader interpretation, we modify its meaning to comport with this intention.

We have considered the NCAA's remaining contentions and conclude they lack merit.

/s/ Gunderson, C.J.
Gunderson
/s/ Steffen, J.
Steffen
/s/ Young, J.
Young
/s/ Springer, J.
Springer
/s/ Mowbray, J.
Mowbray

(Filed February 25, 1988)

IN THE
SUPREME COURT OF THE STATE OF NEVADA

No. 16256

JERRY TARKANIAN, UNIVERSITY OF NEVADA, LAS VEGAS, DR. LEONARD GOODALL, as President of the University of Nevada, Las Vegas and Officer of the University of Nevada, FRANKIE SUE DEL PAPA, LILLY FONG, DOROTHY GALLAGHER, CHRIS KARAMANOS, JOAN DENNEY, DANIEL J. KLAICH, JOHN McBRIDE, JOANN SHERRIN and JUNE WHITELY as Members of the Board of Regents of the University of Nevada,
Appellants and Cross-Respondents,

vs.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Respondent and Cross-Appellant.

ORDER

This is an appeal from a judgment of the district court permanently enjoining appellant University of Nevada, Las Vegas (UNLV) and respondent National Collegiate Athletic Association (NCAA) from suspending appellant Jerry Tarkanian as head basketball coach at UNLV. On August 27, 1987, this court affirmed the judgment of the district court insofar as it granted injunctive relief. The matter was remanded, however, for the reduction of attorney's fees awarded by the district court. *See* Tarkanian v. Nat'l Collegiate Athletic Ass'n, 103 Nev. ....., 741 P.2d 1345 (1987). On September 9,

1987, Tarkanian filed a motion for an award of $99,111.50 as attorney's fees incurred on appeal, including costs incurred in filing this motion. 42 U.S.C. § 1988. Although the NCAA does not directly oppose the motion, it requests this court to remand this matter to the district court for a determination of "reasonable" attorney's fees, if any, which should be awarded to Tarkanian. For reasons expressed below, we deny Tarkanian's motion, without prejudice to his right to raise this motion in the district court below.

Under 42 U.S.C. § 1988, a court has discretionary power to award reasonable attorney's fees as costs to a prevailing party in a § 1983 action. Despite the discretionary language of § 1988, however, the prevailing party should "ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." Northcross v. Board of Ed. of Memphis City Schools, 611 F.2d 624, 633 (6th Cir. 1979) (quoting S. Rep. No. 1011, 94th Cong., 2d Sess. 4, *reprinted in* 1976 U.S. Code Cong. & Admin. News 5908, 5912), *cert. denied* 447 U.S. 911 (1980). Attorney's fees under § 1988 are not limited to compensation for services rendered in the trial court, but include compensation for services rendered on appeal. *See* Northcross, 611 F.2d at 637; Jordan v. Multnomah County, 799 F.2d 1262 (9th Cir. 1986), *modified* 815 F.2d 1258 (1987). Moreover, the prevailing party in a § 1983 action is also entitled to recover costs incurred in litigating a fee issue at the trial court level and on appeal, to the extent reasonably necessary to obtain a fee. *See* Prandini v. National Tea Co., 585 F.2d 47 (3rd Cir. 1978); Ferdinand v. City of Fairbanks, 599 P.2d 122 (Alaska 1979).

In the present case neither party has alleged special circumstances that would render an award of attorney's fees unjust. Therefore, we conclude that Tarkanian, as the prevailing party, is entitled to reasonable attorney's fees for services rendered on appeal, including costs reasonably incurred in bringing the present motion. We note, however, that the determination of a "reasonable" attorney's fee involves questions of fact. *See* Pennsylvania v. Dela. Valley Citizens' Council, ... U.S. ....., 106 S.Ct. 3088 (1986). These questions should be addressed, in the first instance, by the district court with its greater fact-finding capabilities, subject to our review. *See* Northcross, 611 F.2d at 637; Smith v. Detroit Board of Educ., 728 F.2d 359 (6th Cir. 1984). Additionally, the district court's consideration of the present motion, together with the questions before it on remand, will serve judicial economy and avoid a bifurcated determination of reasonable attorney's fees. Accordingly, we deny Tarkanian's motion for an award of attorney's fees incurred on appeal, without prejudice to his right to raise this motion in the district court below.

It is so ORDERED.

/s/ Gunderson, C. J.
Gunderson
/s/ Steffen, J.
Steffen
/s/ Young, J.
Young
/s/ Springer, J.
Springer
/s/ Mowbray, J.
Mowbray

cc: Hon. Earle W. White, Jr., District Judge
Lionel Sawyer & Collins
Jones, Jones, Close & Brown
Beasley, Hamilton & Holden
David Goldwater
Swanson, Midgley, Gangwere, Clark & Kitchin
Loretta Bowman, Clerk

University of Nevada, Reno
Desert Research Institute

University of Nevada, Las Vegas
Community College Division

TENURED PROFESSIONAL EMPLOYMENT DOCUMENT

Name Jerry Tarkanian Date June 20, 1977

Address 2905 Justice Lane, Las Vegas, NV 89107

Check One: New Appointment ☐ Continuing Appointment ☒ Social Security Number 282-26-8807

Birthdate 8/8/30 Sex M Highest Degree Earned M.A.

CURRENT APPOINTMENT

College	UNLV	Department	Athletics		
Position Title	Head Basketball Coach and Prof. of Physical Education	Rank	4	Step	18.5+
Term Dates	From July 1, 1977	To	June 30, 1978		
Type of Appointment	"A" 12 Months ☒	"B" Academic Year ☐			
Contract Salary $	36,000	Monthly Installment Rate	$ 3,000		

To be paid as follows:

Account Number to be Charged	Position Number	% FTE	Account Amount	Monthly Amount
101-5050-000-1101	P-63-002	.85	30,883	
101-4354-000-1101	P-42-043	.15	5,117	

REMARKS

MARKED FOR IDENTIFICATION
Defendant's Proposed Exhibit K
A 173498

PRIOR YEAR APPOINTMENT

Division	UNLV	College		Department	Athletics		
Position Title	Prof. of Physical Education & Head Basketball Coach	Rank	4	Step	15.5+		
Term Dates	From 7/1/76	To	6/30/77				
Type of Appointment	"A" 12 Months ☒	"B" Academic Year ☐	Letter of Appointment ☐	Prior Year % FTE	100	Prior Year Contract Salary	$ 32,000

The *University Code* requires that all terms and conditions of employment be specified in this document. Any special understandings, promises, prior negotiations or representations, or conditions not specified in the REMARKS section above shall not be considered a part of the contract of employment of the professional employee.

The *University Code* and the *Rules and Disciplinary Procedures for Members of the University Community*, the official documents governing personnel matters and procedures concerning the professional staff, are regularly published documents and are available in the offices of the Presidents of the four divisions and the Vice Presidents for Academic Affairs at UNR and UNLV; are incorporated herein and by this reference made a part of this contract. This contract is not binding or of any legal effect until duly executed by both the appointee and the Division President.

I have reviewed this document and find it to be satisfactory. I recommend the document for approval and signature:

Department Chairman 6-27-77 Date

Dean Date

Vice-President Date

I accept all of the conditions listed above and on the reverse side of this page:

Signature of Appointee Jerry Tarkanian 6/20/77 Date

Accepted on behalf of the University of Nevada thereby making this document a contract:

President, University of Nevada, Las Vegas 6-29-77 Date

SEE ADDITIONAL TERMS ON REVERSE SIDE HEREOF

DISTRIBUTION: WHITE – Academic Personnel; BLUE – Payroll; GREEN – Department; PINK – Retirement; YELLOW – Chancellor; YELLOW – Dean; BLUE – Employee

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NCAA EXHIBIT HH
FOR IDENTIFICATION
GARLAND L. WALKER, ROYLE & SMITH

PLAINTIFF'S EXHIBIT #1

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PLAINTIFF'S TRIAL EXHIBIT #9

UNIVERSITY OF NEVADA, LAS VEGAS
4505 Maryland Parkway Las Vegas, Nevada 89154
Office of the President (702) 739-3201

September 7, 1977

Mr. Jerry Tarkanian
Head Basketball Coach
University of Nevada, Las Vegas
Las Vegas, Nevada

Dear Jerry:

Dr. Brock Dixon, who was appointed by me to conduct your University hearing after the NCAA Council appeal, has submitted his decision to me. A copy of that decision is enclosed with this letter. I think you will find that Brock's dilemma and that of the University is well set out in the decision.

In addition, you should be aware of recent actions that the University has taken in attempting to resolve this matter. Notably, Bill Ireland and I spoke with the NCAA Committee on Infractions and Bill Hunt by conference telephone call yesterday. Despite discussion of virtually every alternative to your suspension that the University had considered and even discussion of NCAA staff suggestions on other proposals, the Committee on Infractions rejected any and all alternatives. As a result, I feel it would be impossible for the University to show cause why additional penalty should not be imposed if the University fails to take the action dictated by the Committee, and the University is simply left without alternatives.

It is, therefore, my unpleasant task to inform you that, effective 5:00 p.m., Friday, September 9, 1977, you shall

be completely severed of any and all relations, formal or informal, with the University's Intercollegiate athletic program during the period of the University's NCAA probation. Such relations shall include, but not be limited to, activities associated with administration, supervision, coaching, recruiting, athletic booster groups, and public relations or fund-raising activities related to the University's athletic program.

Please contact my office Monday morning, September 12, 1977, for an appointment in order that we might discuss your future employment duties with the University.

Sincerely,

Donald H. Baepler
President

DHB/pf
cc: Mr. Samuel Lionel

PLAINTIFF'S TRIAL EXHIBIT #10

UNIVERSITY OF NEVADA, LAS VEGAS
4505 Maryland Parkway Las Vegas, Nevada 89154
Vice President for Administration

September 6, 1977

MEMORANDUM

TO: Donald H. Baepler
President

FROM: Brock Dixon

Acting under the authority of your memorandum of August 31, 1977, at 10 a.m. this morning, I convened a hearing on the matter of NCAA sanctions as they apply to the continued association of Coach Tarkanian with the athletic program. Present were: Coach Tarkanian, Mr. Seidman representing the University's position, Mr. Sam Lionel assisted by Mr. Mark Solomon representing Coach Tarkanian. For two hours and fifteen minutes I heard evidence on the substance of the NCAA charges, Mr. Seidman ably and vigorously presenting them and Mr. Lionel just as ably and vigorously contesting them. From 12:15 p.m. to 12:45 p.m. I heard arguments dealing with the justification for the sanctions and their appropriateness and on the position the University ought to take with respect to them. Obviously, one could not in the course of three hours hear a recapitulation of all the evidence or all of the arguments which have hitherto been advanced in this matter but with the assistance of two well-prepared contending attorneys I think I can claim to have reheard enough things to justify this memorandum of findings and recommendations.

The factual basis for the NCAA's charges and sanctions as they apply to Coach Tarkanian is clearly in doubt. The University has been contending for months that the NCAA's investigators were biased and frequently in error. In almost every factual situation delineated by the NCAA, the University's own investigation has been able to find a substantial body of conflicting evidence, some of which has been heard and considered by the NCAA and some of which has been brushed aside. Much of the NCAA case rests on what are reported to be initial statements by Robert (Jeep) Kelley. Much of Mr. Tarkanian's case has rested on evidence that the "initial statements" were not so much Kelley's as Coach Morroco's. In several instances the NCAA was given complete and to me convincing evidence that Coach Tarkanian had not done things that he has been alleged to have done.

Most serious is the charge that Coach Tarkanian attempted to frustrate the NCAA's application of the rules by getting people to "change their story" or to fabricate bodies of countervailing evidence. I am not convinced that the NCAA investigation adequately supports this charge and yet we must remember that the NCAA infractions committee and the NCAA Council, both composed of distinguished scholars, administrators, and lawyers, believed otherwise. Some of the NCAA arguments are absurd, e.g., that Kelley feared harm if he co-operated with the NCAA. What kind of harm? During the time when Kelley had little success on the court and no more in the classroom and thereafter, Tarkanian was supportive and helpful but, I think, no more so than any proper coach would be with respect to students in similar difficulties.

The NCAA authorities chose to believe that the University countered the investigation by attacking the staff. One cannot discount the belief of honorable committees and councils in their tried and proven staff members. Neither can one accept at face value the results of investigations which show a man like Kelley at a wrong address when the question of where he lived is really at issue. One is forced to wonder why an investigator, in this case Mr. Berst, would tell his governing authorities that Kelley called him when Kelley was in fact returning Berst's own call. Mr. Lionel made the point that years of investigating experience may result in a zeal which dulls the ethics of objectivity. Mr. Seidman just as credibly argued that years of investigating experience may hone the search for truth to a sharp edge. I conclude that the motives and methods of investigators are not above challenge and in this case the methods at least were remarkably slipshod yielding bad addresses, bad dates, doubtful attributions and some inaccuracies that are gross indeed. This leads me to the Harvey Munford grade case.

Investigator McMenamin came upon a story that a basketball player named Mr. David Vaughn got a grade in a university course taught by Mr. Munford with a prior agreement that he would not have to appear or do any work. Other students including a student who was paid for typing his term paper and others who recognized this basketball player by his size, say it did not happen. Mr. Munford's attorney arranged to subject him to a professional polygraph examination which indicated that Munford's denial of the accusation was true. In this narrow instance I conclude that good investigation would have dug up some of the denials along with the original

story, and this conclusion was strongly reinforced by a later separate hearing devoted entirely to NCAA sanctions as they affect Mr. Munford.

If one believes all or substantially all of the charges and allegations it may follow as the NCAA Council asserts that Coaches Bayer and Tarkanian "knowingly and willfully" tried to operate the basketball program in violation of NCAA rules and in that case there must have been failure of one or both to report offenses against those rules and participation by one or both in certification of compliance which were not true. The NCAA authorities believed enough of the allegations to activate the domino effect which validates these last points.

I turn now to the arguments concerning the proposed sanctions. It is clear that to the extent that the University ignores them it invites reconsideration by NCAA authorities and one must believe that they will impose heavier and not lighter penalties. Accordingly, our action or non-action with respect to the proposed sanctions is consequential indeed. If we do not implement them we invite heavier penalties and if we do we are asked among other things to disassociate from his professional duties without normal notice a tenured member of the professional staff.

Mr. Seidman argues persuasively that by joining the NCAA we delegated to that organization the establishment of governing standards and their enforcement as well. We are allowed and encouraged to make our own investigations but this is in no way a substitute for the investigative functions of the NCAA itself. We must live by our commitments to the NCAA, its standards and its machinery. We must accept their findings of fact as in some way superior to our own and, if we do

not like the way the NCAA works, our remedy is to work for reform within the organization. In this instance we could wish for standards and due process and evidence far superior to that which we have observed, but given the terms of our adherence to the NCAA we cannot substitute—biased as we must be—our own judgment on the credibility of witnesses for that of the infractions committee and the Council. Mr. Seidman further argues that no one could be a better judge of the appropriateness of sanctions to circumstances than the NCAA governing bodies which make all of the investigations and impose all of the sanctions. Appropriateness is to be judged largely in terms of what has happened to other schools in roughly similar positions and we cannot substitute our judgment for the NCAA's on this point.

Mr. Lionel agrees that the University did delegate to the NCAA along the lines argued by Mr. Seidman. He goes on to say that there must be limits on the breadth of this delegation and that the University must never have intended to delegate the power to punish without even minimum respect to due process. He argues that there was not a minimum of respect for Mr. Tarkanian's or the University's rights, pointing out that the University was never able to get any guidelines on preparing its appeal or any indication of how appeals might be handled, that the NCAA never investigated Mr. Berst's motives even after we questioned them, that we did not know the source of the original allegations until a formal hearing stage had been reached, that Coach Tarkanian was never given an opportunity to confront or cross-examine, that the University was never able to get a transcript of hearings for study, and finally, that the NCAA Council made its findings and affirmation with-

out ever having had an opportunity to see the transcripts of earlier hearings. Mr. Lionel argued that for the University to impose a sanction under these circumstances is to become a party to a grave injustice.

I find:

1. That the NCAA's delegation by the terms of our adherence is as broad as Mr. Seidman argues.
2. That in this instance the NCAA's standards of proof and due process were inferior to what we might reasonably expect of any organization to which we belong and that institutionally we must work for a reform of the NCAA in these respects. (I agree that the NCAA is a proper judge of the appropriateness of certain sanctions to certain kinds of offenses.)

Here are alternatives:

1. Reject the sanction requiring us to disassociate Coach Tarkanian from the athletic program and take the risk of still heavier sanctions, e.g., possible extra years of probation.
2. Recognize the University's delegation to the NCAA of the power to act as ultimate arbiter of these matters, thus reassigning Mr. Tarkanian from his present position—though tenured and without adequate notice—even while believing that the NCAA was wrong.
3. Pull out of the NCAA completely on the grounds that you will not execute what you hold to be their unjust judgments.

I recommend that you execute the proposed sanctions of the NCAA as they apply to Coach Tarkanian.

PLAINTIFF'S TRIAL EXHIBIT #16

1976-77

MANUAL

of the

National Collegiate

Athletic Association

Constitution, Bylaws and Interpretations
Executive Regulations and Recommended Policies
Administrative Organization and Committees
Enforcement Procedure and Roll of Members
Constitution and Bylaws Case Book

THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION

U.S. Highway 50 and Nall Avenue
P.O. Box 1906
Shawnee Mission, Kansas 66222
913/384-3220
March 1976

This publication incorporates the legislative actions of the 70th Annual NCAA Convention, January 15-17, 1976; the Second Special NCAA Convention, August 14-15, 1975, and the Third Special NCAA Convention, January 14, 1976.

Paragraphs which were changed by the 70th Convention or by either of the Special Conventions are set off by a gray background. A special notation indicates those changes which do not become effective until August 1, 1976.

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(c) 1976 by The National Collegiate Athletic Association

Constitution and Interpretations of The National Collegiate Athletic Association

ARTICLE ONE

The name of this organization shall be "The National Collegiate Athletic Association."

ARTICLE TWO

PURPOSES AND FUNDAMENTAL POLICY

Section 1. Purposes. The purposes of this Association are:

(a) To initiate, stimulate and improve intercollegiate athletic programs for student-athletes and promote and develop educational leadership, physical fitness, sports participation as a recreational pursuit and athletic excellence.

(b) To uphold the principle of institutional control of, and responsibility for, all intercollegiate sports in conformity with the Constitution and Bylaws of this Association.

(c) To encourage its members to adopt eligibility rules to comply with satisfactory standards of scholarship, sportsmanship and amateurism.

(d) To formulate, copyright and publish rules of play governing intercollegiate sports.

(e) To preserve intercollegiate athletic records.

(f) To supervise the conduct of, and to establish eligibility standards for, regional and national athletic events under the auspices of this Association.

(g) To cooperate with other amateur athletic organizations in promoting and conducting national and international athletic events.

(h) To legislate, through Bylaws or by resolution of a Convention, upon any subject of general concern to the members in the administration of intercollegiate athletics.

(i) To study in general all phases of competitive intercollegiate athletics and establish standards whereby the colleges and universities of the United States can maintain their athletic activities on a high level.

Section 2. Fundamental Policy. (a) The competitive athletic programs of the colleges are designed to be a vital part of the educational system. A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body, and by so doing, retain a clear line of demarcation between college athletics and professional sports.

(b) Legislation governing the conduct of intercollegiate athletic programs of member institutions shall apply to basic athletic issues such as admissions, financial aid, eligibility and recruiting; member institutions shall be obligated to apply and enforce this legislation, and the enforcement program of the Association shall be applied to an institution when it fails to fulfill this obligation.

* * *

ARTICLE THREE

PRINCIPLES FOR THE CONDUCT OF INTERCOLLEGIATE ATHLETICS

* * *

Section 2. Principle of Institutional Control and Responsibility. The control and responsibility for the conduct of intercollegiate athletics shall be exercised by the institution itself and by the conference, if any, of which it is a member.

* * *

Section 6. Principles of Ethical Conduct. It shall be a member institution's responsibility to apply and enforce the following principles:

(a) Individuals employed by, or associated with, a member institution to administer, conduct or coach intercollegiate athletics and all participating student-athletes shall deport themselves with honesty and sportsmanship at all times so that intercollegiate athletics as a whole, their institutions and they, as individuals, shall represent the honor and dignity of fair play, and the generally recognized high standards associated with wholesome competitive sports.

* * *

ARTICLE FOUR

MEMBERSHIP

Section 1. Eligibility for Membership. Colleges, universities, other institutions of learning, athletic conferences or associations and other groups related to intercollegiate athletics, located in the United States, its territories or possessions, with acceptable academic standards as defined in the Bylaws, which accept and observe the principles set forth in the Constitution and Bylaws of the Association, are eligible for membership in this Association.

Section 2. Conditions and Obligations of Membership. The members of this Association agree:

(a) To administer their athletic programs in accordance with the Constitution, the Bylaws and other legislation of the Association;

* * *

Section 6. Termination of Membership—Discipline of Members. (a) Disciplinary powers of the Association shall be exercised in accordance with the provisions of this Section and the Bylaws.

(b) The membership of any member failing to maintain the academic or athletic standards required for membership, or failing to meet the conditions and obligations of membership, may be terminated or suspended or the member otherwise disciplined by a vote of two-thirds of the delegates present and voting at an annual Convention, provided that a member shall not be suspended or its membership terminated unless:

(1) Notice of intention to move such termination or suspension, stating the grounds on which such motion will be based, is given in writing to the Secretary of this Association, and to the president of such member on or before the first day of November prior to the Convention; and

(2) The Council approves the giving of the notice of intention to move for such termination or suspension; and

(3) Such notice is included in the Official Notice of the annual Convention.

(c) Disciplinary or corrective actions other than suspension or termination of membership may be effected during the period between annual Conventions by members of the Committee on Infractions present and voting at any duly called meeting thereof, provided the call of such meeting shall have contained notice of the situation presenting the disciplinary problem. The actions of the Committee on Infractions, however, shall be subject to review by the Council upon appeal. (*Revised*: 1/13/73)

* * *

Section 7. Reinstatement of Members. (a) Any member whose membership has been terminated under Constitution 4-6-(b) may be reinstated to membership by a two-thirds vote of the members present and voting at any annual Convention.

* * *

ARTICLE FIVE

ORGANIZATION

Section 1. Council. The establishment and direction of the general policy of the Association in the interim between Conventions is committed to a Council of eighteen members, which shall be elected at the annual Convention of the Association.

(a) The Council shall be constituted as follows:

(1) The President and Secretary-Treasurer shall be ex officio members, and shall be chairman and secretary, respectively, of the Council, and they may be elected from any division. (*Revised*: 8/6/73)

(2) Eight members of the Council shall consist of the eight district vice-presidents of this Association. (*Revised*: 8/6/73)

(3) Eight vice-presidents-at-large shall be elected by the Association at the annual Convention to serve for a term of three years; however, they shall not be eligible for re-election as vice-presidents-at-large until three years have elapsed. (*Revised*: 8/6/73)

(4) Among the sixteen vice-presidents, eight shall represent Division I members, four shall represent Division II members and four shall represent Division III members. (*Adopted*: 8/6/73)

(5) The membership of a "playing conference," i.e., one which conducts a regular conference schedule in football or basketball, may not be represented

on the Council by more than one individual, excluding the President and Secretary-Treasurer. (*Adopted*: 8/6/73)

* * *

Section 6. Meetings. (a) There shall be an annual Convention of this Association during the second week of January, or at such other time as may be prescribed by the Executive Committee.

(b) Special meetings of the Association shall be called by the President on the written request of twelve or more members of the Council.

(c) One hundred active and allied members represented as prescribed in this Constitution shall constitute a quorum for the transaction of business of the Association. For purposes of voting by membership divisions as prescribed by the Bylaws, forty members of each division shall constitute a quorum. (*Revised*: 8/6/73)

(d) Each active and allied member shall be entitled to one vote and may be represented at the annual Convention and at special meetings by one to three accredited delegates.

(e) Each associate and affiliated member shall be entitled to one delegate without voting power.

(f) Member and non-member institutions are authorized to send visiting delegates who shall be without voting power and shall not actively participate in the business proceedings of the Association.

* * *

ARTICLE SIX

BYLAWS, INTERPRETATIONS, EXECUTIVE REGULATIONS AND RESOLUTIONS

Section 1. Bylaws. (a) The Association may at any annual or special Convention adopt or amend any Bylaws not inconsistent with the provisions of the Constitution by a majority vote of the members present and voting, except where a greater majority may be required by the Bylaws. Bylaws may be adopted or amended by vote of a membership division within the Association as prescribed by the Bylaws. (*Revised*: 8/6/73)

(b) Except as otherwise specifically set forth in this Constitution, the Bylaws may provide rules and regulations governing:

(1) The administration of intercollegiate athletics by members of the Association.

(2) The establishment and control of meets, tournaments, games and other athletic events sponsored by the Association.

(3) The procedures for administering and enforcing the provisions of the Constitution and Bylaws.

(4) The adoption of rules of play and competition in the various sports, and the delegation of authority in connection with such subjects to individuals, officers or committees.

(c) The enumeration of the foregoing particulars which may be included in the Bylaws shall not limit in any way the general power and authority in the adoption of Bylaws permitted by the first sentence of this Section.

* * *

ARTICLE SEVEN

AMENDMENTS

Section 1. This Constitution may be amended at any annual or special Convention by a two-thirds majority of the delegates present and voting provided that the proposed amendment shall have been submitted to the Secretary of the Association by written, wired transmission received at the national office by November 1 or by certified or registered mail postmarked by October 25 preceding an annual Convention, or sixty days preceding a special Convention. (*Revised*: 1/13/73, 1/8/75, 1/17/76)

* * *

Bylaws and Interpretations of The National Collegiate Athletic Association

[NOTE: Bylaw Articles Seven, Eight, Nine and Ten, as well as Sections 4, 5 and 6 of Article Six, are "common" Bylaws and apply in their entirety to the three divisions of the Association. The other Bylaw Articles may be amended by a division acting separately. In those Articles, portions that are applicable to one or two divisions but not to all three are designated appropriately in the margin. Where there is no marginal designation, the provision pertains to all three divisions.]

ARTICLE ONE

RECRUITING

Section 1. Contacts and Offers. (a) No member of an institution's athletic staff or other representative of athletic interests shall solicit the enrollment of any prospective student-athlete at his institution by giving or offering to give financial aid or equivalent inducements, except such aid as is permitted by this Association and his institution and the conference of which it may be a member.

* * *

O.I. 102. An institution's staff member or any other representative of an institution's athletic interests shall not, during recruitment of an individual and prior to the individual's enrollment at the institution, be involved, directly or indirectly, in making arrangements for or giving or offering to give any financial aid or other benefits to the prospective student-athlete, his relatives or friends, other than expressly permitted by governing legislation of this Association. This prohi-

bition shall apply regardless of whether similar financial aid, benefits or arrangements are available to prospective students in general, their relatives or friends. Specifically prohibited financial aid, benefits and arrangements include, but are not limited to: arrangement of employment of the relatives of a prospective student-athlete; gift of clothing or equipment; the cosigning of loans; provision of loans to the relatives or friends of a prospective student-athlete; cash or like items; any tangible items including merchandise, free or reduced-cost services or rental or purchases of any type, and free or reduced-cost housing. The arrangement of employment for, and the acceptance of loans from a regular lending agency (based upon a regular repayment schedule) by, the prospective student-athlete shall be permitted.

* * *

Section 3. Tryouts. No member institution shall, on its campus or elsewhere, conduct or have conducted in its behalf any athletic practice session, tryout or test at which one or more prospective student-athletes reveal, demonstrate or display their abilities in any phase of any sport.

* * *

Section 5. Transportation, Visitations and Entertainment.

* * *

(e) No member institution shall permit its athletic staff members or other representatives of its athletic interests to pay or arrange for the payment of the transportation costs incurred by relatives or friends of a prospective student-athlete to visit the campus or elsewhere.

* * *

(3) In all instances, entertainment of the party accompanying a prospective student-athlete to the campus shall be limited to his parent (or legal guardians), and a given prospect's parents (or legal guardians) may be entertained for one and only one visit. Such visit shall not exceed forty-eight hours. (*Revised*: 8/1/73)

(f) An institution, or representatives of its athletic interests, may provide entertainment for a prospective student-athlete, his parents (or legal guardians) at the institution's campus only. Transporting a prospective student-athlete to any other site for any purpose is not permissible. Further, it is not permissible to entertain other relatives or friends of a prospective student-athlete at any site. A prospective student-athlete visiting a member institution's campus shall live and take his meals as regular students normally do. If campus facilities are not available, local commercial facilities may be used, but at a scale comparable to that of normal student life. His entertainment shall take place on campus; however, if on-campus entertainment is not available and it is necessary to entertain a prospective student-athlete off-campus, a student host may be provided with a maximum of ten dollars for

each day of the visit to cover the cost of actual and necessary entertainment expenses. No member institution may arrange for or permit excessive entertainment of any prospective student-athlete on the campus or elsewhere. The institution (or representatives of its athletic interests) shall not provide cash to the prospect for entertainment purposes and shall not provide an automobile for the use of the prospect or a student host. (*Revised*: 8/1/72, 8/1/73)

* * *

(i) An institution shall not pay any costs incurred by an athletic talent scout or a representative of its athletic interests in studying or recruiting prospective student-athletes. An institution may not place any such person on a fee or honorarium basis and thereby claim him as a staff member entitled to expense money. (*Revised*: 8/1/74)

* * *

Section 6. Pre-College Expense. (a) No institution or a representative of its athletic interests shall offer, provide, or arrange financial assistance, either directly or indirectly, for a prospective student-athlete (1) to pay in whole or in part the costs of his educational or other expenses for any period prior to his enrollment, or (2) to obtain a postgraduate education.

* * *

ARTICLE FOUR

ELIGIBILITY RULES FOR N.C.A.A. CHAMPIONSHIPS

* * *

Section 6. Institutional Eligibility. The NCAA sponsors thirty-nine national championships of which seventeen are National Collegiate Championships, twelve are National Collegiate Division II Championships and ten

are National Collegiate Division III Championships. (The listing of NCAA meets and tournaments is contained in Bylaw 6, pages 68-69.) To be eligible to enter a team or individual in NCAA championship competition, an institution must be an active member in good standing and be eligible under the rules of the intercollegiate athletic conference of which it is a member, provided the conference is an allied member of the Association. (*Revised*: 8/6/73)

* * *

(d) A member institution shall not be eligible to enter a team or individual competitors in an NCAA-sponsored meet or tournament unless its chief executive officer certifies annually on a form and by a date (the original or a copy of the form to be received at the NCAA national office by that date) approved by the NCAA Council that: (*Adopted*: 8/1/74, *Revised*: 1/17/76)

(1) He or his designated representative has reviewed with all athletic department staff members the rules and regulations of the Association as they apply to the administration and conduct of intercollegiate athletics; (*Adopted*: 8/1/74)

(2) At the time of such certification no current member of its coaching staff has been temporarily or permanently suspended from his coaching duties by another member institution during the past two years as a result of his involvement in a violation of the principles of ethical conduct set forth in Constitution 3-6-(a), as determined by the NCAA Committee on Infractions or the NCAA Council; provided the period of suspension is in effect, and provided the coaching staff member has been given through the institution notice of an opportunity to be heard at both the NCAA hearing, resulting in the finding of

his involvement in the violation, and the institutional hearing resulting in his suspension. (*Adopted*: 1/8/75, *Revised*: 1/17/76)

(3) The policies, procedures and practices of the institution, its staff members and representatives of athletic interests are in compliance at the present time with the Association's legislation insofar as he can determine, and (*Adopted*: 8/1/74)

(4) A current statement has been filed with the chief executive officer, as a part of the institution's annual certification, which is signed by each athletic department staff member (except for clerical personnel) attesting that the staff member has reported his knowledge of and involvement in any violations of NCAA legislation involving the institution, and (*Adopted*: 8/1/75)

(5) It is the intention of the institution to maintain such compliance. (*Adopted*: 8/1/74)

* * *

ARTICLE SEVEN

MEMBERSHIP

* * *

Section 5. Discipline of Members. (a) Complaints charging any member institution with failure to maintain the academic or athletic standards required for membership, or failure to meet the conditions and obligations of membership in the Association, may be filed either with the Committee on Infractions or the executive director, or both. Each shall have the authority, either upon the filing of such a complaint or upon its or his own initiative, to institute an inquiry or investigation. (*Revised*: 1/13/73)

(b) The Council shall formulate and publish the procedure governing the administration of the enforce-

ment program as well as the performance of duties under this Section, and distribute it to the membership of the Association. [Note: The procedure, as approved, may be found on pages 116-123.] (*Revised*: 1/13/73)

(c) A member under investigation:

(1) Shall be given notice of any specific charges against it, and the facts upon which such charges are based, and

(2) Shall be given an opportunity to appear before the Committee on Infractions (or Council upon appeal) to answer such charges by the production of evidence. (*Revised*: 1/13/73)

(d) All members of the Association are under an obligation to cooperate with the executive director (and his staff), the Committee on Infractions and the Council, and to answer all relevant inquiries submitted to them. (*Revised*: 1/13/73)

(e) The Committee on Infractions shall determine whether it shall itself impose disciplinary measures authorized by Constitution 4-6, or recommend that such action be taken by the Council or next annual Convention. (*Revised*: 1/13/73)

* * *

ARTICLE EIGHT

COMMITTEES

* * *

Section 2. Special Committees. (a) The Council of the Association is empowered to appoint the following committees and any other special committees it deems necessary. The actions of such committees shall be subject to approval of the Council and the number of members of each committee shall be determined by the Council.

Academic Testing and Requirements
All-Star High School Games
Classification
Drug Education
Eligibility
Executive
Governmental Affairs
Infractions
Insurance
International Relations
Junior College Relations
Long Range Planning
Postgraduate Scholarship
Promotion
Professional Sports Liaison
Public Relations
Summer Baseball
Television
Theodore Roosevelt Award

(1) Unless otherwise specified herein, the members of each of the aforementioned committees shall be appointed for terms of three years, they shall be on the staff of a member of the Association and their terms shall commence on the first day of September following their election. (*Revised*: 8/1/74)

(2) Members may be reappointed for one additional term and after three years have elapsed, a former member may be appointed to an additional term following which he may not serve further on that committee. This paragraph shall not apply to the members of the Executive Committee, Governmental Affairs Committee, Promotion Committee and the Committee on Infractions. (*Revised*: 8/1/75)

* * *

(h) The Infractions Committee shall be composed of five members at present or previously on the staff of an active or allied member of the Association elected for three-year terms. A member shall not serve more than nine years on the Committee. Its duties and procedures shall be outlined in the Official Procedure governing the NCAA Enforcement Program, as approved and adopted by the Council and the annual Convention of the Association. (*Revised*: 1/9/74)

* * *

ARTICLE NINE

AMENDMENTS

Section 1. These Bylaws may be amended at any annual or special Convention by a majority vote of the delegates present and voting provided that the proposed amendment shall have been submitted to the Secretary of the Association by written, wired transmission received at the national office by November 1, or by certified or registered mail posmarked by October 25 preceding an annual Convention, or sixty days preceding a special Convention. (*Revised*: 1/13/73, 1/8/75, 1/17/76)

(a) Each division of the Association may at any Convention, by a majority vote of the members of such division present and voting, adopt or amend any Bylaw not inconsistent with the provisions of the Constitution or this Section. Bylaws 6-4, 6-5 and 6-6 and all Sections of Bylaws 7, 8, 9 and 10 apply to the three divisions of the Association and thus any amendment of them must be adopted by all three divisions. The other Bylaw articles and sections may be amended by one or more divisions acting separately, and such legislation shall apply only to the division which adopts it. (*Adopted*: 9/1/73, *Revised*: 1/14/76)

* * *

Official Procedure Governing The NCAA Enforcement Program

As approved and adopted by the Council and Convention of the Association

Individuals employed by or associated with member institutions for the administration, the conduct or the coaching of intercollegiate athletics are, in the final analysis, teachers of young people. Their responsibility is an affirmative one and they must do more than avoid improper conduct or questionable acts. Their own moral values must be so certain and positive that those younger and more pliable will be influenced by a fine example. Much more is expected of them than of the less critically placed citizen.

All representatives of educational institutions are expected to cooperate fully with the NCAA investigative staff, Committee on Infractions and Council to further the objectives of the Association and its enforcement program. The enforcement procedures are an essential part of the intercollegiate athletic program of each member institution and require full and complete disclosure by all institutional representatives of any relevant information requested by the NCAA investigative staff, Committee on Infractions or Council during the course of an inquiry.

Section 1. The Council shall designate a Committee on Infractions which shall be responsible to administer the NCAA enforcement program. The Committee shall: (1) consider complaints which may be filed with the Association charging the failure of any member to maintain the

academic or athletic standards required for membership or the failure of any member to meet the conditions and obligations of membership in the Association; (2) provide general guidance to the NCAA investigative staff in the development of information related to alleged violations; (3) determine facts related to alleged violations and fine violations of NCAA rules and requirements; (4) impose appropriate penalties on a member found to be in violation, or recommend to the Council suspension or termination of membership; (5) carry out any other duties directly related to the administration of the Association's enforcement program. The Committee shall be composed of five members, one of whom shall serve as chairman. Three members present and voting shall constitute a quorum for conduct of Committee business, it being understood that the chairman shall make a special effort to have full Committee attendance when major infractions cases involving violations are to be considered.

Section 2. All allegations and complaints relative to a member's failure to maintain the academic or athletic standards required for membership, the member's violation of the legislation or regulations of the Association, or the member's failure otherwise to meet the conditions and obligations of membership, shall be received by the Committee or the Association's executive director and channeled to the NCAA investigative staff. The investigative staff, so far as practicable and under the general guidance of the Committee, shall make a thorough investigation of all such charges which are received from responsible sources and are reasonably substantial. The investigative staff may conduct a preliminary inquiry to determine whether there is adequate evidence to warrant an official inquiry, and in conducting this inquiry the

services of a field investigator may be used. Under the general guidance of the Committee, the investigative staff also may initiate an investigation on its own motion when it has reasonable cause to believe that a member is or has been in violation of its obligations as a member of the Association.

Section 3. If the Committee on Infractions, after consideration of the information which has been developed and after consultation with the investigative staff, determines that there has been a violation not of a serious nature, it may privately reprimand and censure without a hearing; if it determines that an allegation or complaint warrants an official inquiry, it shall determine its scope and thrust and direct a letter to the chief executive officer of the member involved (with copies to the faculty representative and athletic director of the member, and to the executive officer of the allied conference of which the institution is a member) fully informing him of the matter under inquiry and requesting his cooperation to the end that the facts may be discovered. By this letter, the Committee shall call upon the chief executive officer of the member involved for the disclosure of all relevant information and may require his appearance or the appearance of his representative before the Committee at a time and place which is mutually convenient, if such appearance is deemed necessary by the Committee. Similarly, a member which is subject to official inquiry shall, upon its request, be given the opportunity to have representatives appear before the Committee. If a member declines to meet with the Committee after having been requested to do so, the member shall not have the right to appeal either the Committee's findings of facts and violations or the resultant penalty.

Section 4. (a) If a member appears before the Committee to discuss its response to the Committee's official inquiry, the hearing shall be directed toward the general scope of the official inquiry but shall not preclude the Committee from finding any violation resulting from information developed or discussed during the hearing. During the hearing, the investigative staff first shall present the information which its investigation has developed. The member will then present its explanation of the alleged violations and questionable practices, and any other arguments or information which it deems appropriate in the Committee's consideration of the case. The Committee, at the discretion of any of its members, shall question representatives of the member or the investigative staff, as well as any other persons appearing before it, in order to determine the facts of the case. Further, under the direction of the Committee, questions and information may be exchanged between and among all parties participating in the hearing. The exact procedure to be followed in the conduct of the hearing will be determined by the Committee.

(b) After all presentations have been made and the hearing has been concluded, the Committee shall excuse all others from the hearing and the Committee shall make its determinations of fact and violation. In arriving at its determinations, it may request additional information from any appropriate source including the member or the investigative staff. If the Committee determines there has been a violation or questionable practice, it shall impose an appropriate penalty, or it may recommend to the Council suspension or termination of membership in an appropriate case. The finding of a violation or questionable practice shall be by majority

vote of the members of the Committee present and voting. The imposition of a penalty or recommended action shall require the favorable vote of at least three members of the Committee.

Section 5. The Committee, without prior public announcement, shall be obligated to promptly submit a written report, which sets forth its findings and penalty to be imposed, to the chief executive officer of the member (with copies to those individuals receiving copies of the official inquiry) which has been subject to the official inquiry. The member then shall have the right to give written notice of appeal of the Committee's findings, the penalty, or both, to the Council. To be considered by the Council, the notice of appeal must be received by the NCAA executive director, Shawnee Mission, Kansas, not later than fifteen calendar days from the date the member institution received the Committee's report. The member's notice of appeal shall contain a statement of the date the Committee's report was received by the chief executive officer. If the notice of appeal is not received within the fifteen-day period, or the member determines not to appeal, the action of the Committee will be promptly announced by the Committee through the NCAA executive office or at any other site determined by the Committee. The Committee shall forward a report of the case to the Council at the time of public announcement. If appropriate notice of appeal is received, no public announcement will be made until conclusion of the case by the Council. Determinations of fact and violations arrived at in the foregoing manner by the Committee, or by the Council on appeal, shall be final, binding and conclusive, and shall not be subject to further review by the Council or any other authority.

Section 6. The Committee shall be obligated to submit a written summary statement to the Council on each case that is subject to appeal, and it shall include:

(1) A statement of the origin of the case.

(2) Violations of NCAA requirements or questionable practices in light of NCAA requirements, as determined by Committee.

(3) Related factors appropriate for consideration in judgment of case.

(4) Disciplinary or corrective actions taken by institution or conference, or any other agency involved in particular incident.

During an appeal to the Council, the chairman or another member of the Committee shall present the Committee's report. The member institution, if it desires to be represented before the Council, may challenge the Committee's finding of fact or penalty, or both. The Council then shall act upon the member's appeal and may accept the Committee's findings and penalty, alter either one or both or make its own findings and impose a penalty which it believes appropriate.

Section 7. (a) The Constitution of the Association provides that disciplinary or corrective actions other than termination or suspension of membership may be effected during the period between annual Conventions by the Committee on Infractions. As a guiding principle, the NCAA penalty should be broad and severe if the violation or violations reflect a general disregard for the governing rules; in those instances in which the violation or violations are isolated and of relative insignificance, then the NCAA penalty shall be specific and limited. Previous violations

of NCAA legislation shall be a contributing factor in determining the degree of penalty.

Among the disciplinary measures, singly or in combination, which may be adopted by the Committee or Council and imposed against an institution are:

(1) Reprimand and censure;

(2) Probation for one year;

(3) Probation for more than one year;

(4) Ineligibility for one or more National Collegiate Championship events;

(5) Ineligibility for invitational and postseason meets and tournaments;

(6) Ineligibility for any television programs subject to the Association's control or administration;

(7) Ineligibility of the member to vote or its personnel to serve on committees of the Association, or both;

(8) Prohibition against an intercollegiate sports team or teams participating against outside competition for a specified period;

(9) Prohibition against the recruitment of prospective student-athletes for a sport or sports for a specified period;

(10) A reduction in the number of either initial or additional financial aid awards (as defined by O.I. 500) which may be awarded during a specified period;

(11) Requirement that an institution which has been represented in an NCAA championship event by

a student-athlete who was recruited or received improper benefits (which would not necessarily render him ineligible) in violation of NCAA legislation shall return its share of net receipts from such competition in excess of the regular expense reimbursement; or if said funds have not been distributed, they shall be withheld by the NCAA executive director; or individual or team records and performances shall be vacated or stricken; or individual or team awards shall be returned to the Association, or any combination of the preceding penalties;

(12) Requirement that a member institution which has been found in violation show cause why:

(i) a penalty or an additional penalty should not be imposed if, in the opinion of the Committee (or Council), it does not take appropriate disciplinary or corrective action against athletic department personnel involved in the infractions case, any other institutional employee if the circumstances warrant, or representatives of the institution's athletic interests; or

(ii) a recommendation should not be made to the membership that the institution's membership in the Association be suspended or terminated if, in the opinion of the Committee (or Council), it does not take appropriate disciplinary or corrective action against the head coach of the sport involved, any other institutional employee if the circumstances warrant, or representatives of the institution's athletic interests.

"Appropriate disciplinary or corrective action" may include, for example, termination of the coaching contract of the head coach and any assistants involved; suspension or termination of the employment status of any other institutional employee who may be involved; severance of relations with any representative of the institution's athletic interests who may be involved; the debarment of the head or assistant coach from any coaching, recruiting or speaking engagements for a specified period, and the prohibition of all recruiting in a specified sport for a specified period. The nature and extent of such action shall be the determination of the institution after due notice and hearing to the individuals concerned, but the determination of whether or not the action is appropriate in the fulfillment of NCAA policies and principles, and its resulting effect on any institutional penalty, shall be solely that of the Committee (or Council). Where this requirement is made, the institution shall show cause, or in the alternative, shall show the appropriate disciplinary or corrective action taken, in writing, to the Committee (or Council) within fifteen (15) days thereafter. The Committee (or Council) may, without further hearing, determine on the basis of such writing whether or not in its opinion appropriate disciplinary or corrective action has been taken, and may impose a penalty or additional penalty, take no further action, or it may, by notice to the institution, conduct a further hearing at a later date before making a final determination.

(b) In some instances, an institution is rendered ineligible to appear on television programs administered or controlled by the Association. When an institution is banned from such television programs, the penalty shall

specify that the institution may not enter into any contracts or agreements for such appearances until the institution's probationary status has been terminated and it has been restored to full rights and privileges of membership.

(c) When an institution has been found to be in violation of NCAA requirements, and the report reflects academic violations or questionable academic procedures, the NCAA executive director shall be authorized to forward a copy of the report to the appropriate regional accrediting agency.

(d) If the Committee, after a review of institutional or conference action taken in connection with a rule infraction, concludes that the corrective or punitive action taken by the institution or conference is representative of and consistent with NCAA policies and principles, the Committee may exercise the discretion to take no further action. Further, self-disclosure shall be considered in establishing penalties, and if an institution uncovers a violation prior to its being reported to the NCAA and/or its conference, such disclosure shall be considered as a mitigating factor in determining the penalty. Also, the Committee may adopt a penalty comparable to the institutional or conference penalty without conducting a hearing with the member; however, the Committee shall notify the member of the NCAA rules or regulations violated and the proposed penalty, and advise the member of the opportunity for a hearing. The member must request such a hearing within fifteen days of the receipt of the Committee's notification, if such a hearing is to be held. If a member requests such a hearing, the procedures outlined in Section 4 shall be followed. In the absence of a member's request for a hearing, the Committee shall impose the penalty and if appropriate make public announcement of its action. Punitive or corrective action taken by an institution or conference shall not prevent the Committee from taking any punitive action which it deems advisable or warranted in any case. In cases of serious violation, the NCAA should not leave the discipline in such cases exclusively to an institution or conference.

(e) The appropriate infractions report of the Committee on Infractions and Council shall contain a consolidated statement of all penalties, corrective actions, requirements and other conditions and obligations of membership imposed upon a member institution found in violation of NCAA legislation. The statement of such actions shall include, but not be limited to, penalties imposed upon the institution, eligibility rules to be applied, applicable Executive Regulations, the adjustment of individual and team standings in NCAA championship events, and the request for the return of any awards and net receipts received for participation in an NCAA championship.

Section 8. When a penalty has been imposed and publicly announced, there shall be no review of the penalty except upon a showing of newly discovered evidence which is directly related to the findings in the case, or that there was a prejudicial error in the procedure which was followed in the processing of the case by the Committee. Any institution which initiates such a review shall be required to submit a brief of its appeal to the Committee at least thirty days prior to a Committee meeting and furnish sufficient copies of the brief for distribution to all members of the Committee; thereupon, the

Committee shall review the brief and decide by majority vote whether it shall grant a hearing of the appeal. Disciplinary measures imposed by the institution or its conference, subsequent to the NCAA's action, may be considered to be "newly discovered evidence" for the purposes of this paragraph. If a hearing of the appeal is granted, the Committee may reduce or eliminate any penalty, but may not impose any new penalty. The Committee's decision with respect to the penalty shall be final and conclusive for all purposes.

Section 9. When the Committee or NCAA Council finds that there has been a violation of the Constitution or Bylaws affecting the eligibility of an individual student-athlete or student-athletes, the institution involved and its conference (if the institution holds such affiliation with an allied member) shall be notified of the violation and the name(s) of the student-athlete(s) involved, it being understood that if the institution fails to take appropriate action, the involved institution shall be cited to show cause under the Association's regular enforcement procedures why it should not be disciplined for failure to do so. It is understood that if an institution concludes that continued application of the rule(s) would work an injustice on any student-athlete, an appeal shall be submitted to the Council and promptly acted upon by the body or a sub-committee designated by it.

Section 10. If a student-athlete who is ineligible under the terms of the Constitution, Bylaws or other legislation of the Association is permitted to participate in intercollegiate competition contrary to such NCAA legislation but in accordance with the terms of a court restraining order or injunction operative against the institution at-

tended by such student-athlete or the Association, or both, and said injunction is subsequently voluntarily vacated or finally determined to have been improvidently issued, the Council may take any one or more of the following actions against such institution in the interest of restitution and fairness to competing institutions:

(a) Requirement that individual or team records and performances achieved during participation by such ineligible student-athlete shall be vacated or stricken;

(b) Requirement that team victories achieved during participation by such ineligible student-athlete shall be abrogated and the games or events forfeited to the opposing institutions;

(c) Requirement that individual or team awards earned during participation by such ineligible student-athlete shall be returned to the Association, the sponsor or the competing institution supplying same;

(d) Determination of ineligibility for one or more National Collegiate Championship events in the sports and in the seasons in which such ineligible student-athlete participated;

(e) Determination of ineligibility for invitational and postseason meets and tournaments in the sports and in the seasons in which such ineligible student-athlete participated;

(f) Requirement that the institution shall remit to the NCAA the institution's share of television receipts for appearing in any national or regional telecast under the NCAA Football Television Plan where the Council concludes that the institution would not have been selected for such telecast but for the participation of such

ineligibile student-athlete during the season of the telecast. Any such funds thus remitted shall be devoted to the NCAA Postgraduate Scholarship Program.

(g) Requirement that the institution which has been represented in an NCAA championship event by such a student-athlete shall return its share of the net receipts from such competition in excess of the regular expense reimbursement; or if said funds have not been distributed, requirement that they be withheld by the NCAA executive director.

Section 11. The Committee on Infractions and the Council shall treat all cases before them as confidential, except as provided above, until the same have been announced in accordance with the prescribed procedures. Any member of the Committee on Infractions or Council who is directly connected with an institution under inquiry shall not take part in any NCAA proceedings connected with the case before the Committee or the Council.

PLAINTIFF'S TRIAL EXHIBIT #24

Law Offices
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703 South Eighth Street
Las Vegas, Nevada 89101

Charles E. Thompson — Area Code 702
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LETTER OF AGREEMENT

February 17, 1983

Bradley L. Rothermel, Director
Department of Intercollegiate Athletics
University of Nevada Las Vegas
4505 Maryland Parkway
Las Vegas, Nevada 89154

Re: University Employment Contract with Jerry Tarkanian Beginning in the 1983-84 University Calendar Year

Dear Mr. Rothermel:

This letter is to memorialize, acknowledge and set forth the agreement and understanding that hereinafter exists between the University of Nevada Las Vegas and my client, Jerry Tarkanian, the Basketball Coach at the University of Nevada Las Vegas.

This letter of agreement is being written after our personal conversation of February 14, 1983, and our telephone conversation of February 15, 1983, in which you set forth that after your meeting with the President of the University and the Chairman of the Board of Regents, the University has agreed to the following con-

tract provisions for the employment of Jerry Tarkanian during his future employment as Head Basketball Coach at the University of Nevada Las Vegas.

It is further my understanding and our agreement that this letter is to set forth those contract provisions and act as a legally enforceable contract agreement between the University of Nevada Las Vegas and Jerry Tarkanian and in that regard our agreement is as follows:

1. Coach Jerry Tarkanian will be entitled to and receive from the University of Nevada Las Vegas the following financial compensations for his duties as Head Basketball Coach beginning with the school calendar year of 1983-84, which begins on July 1, 1983:

A. Jerry Tarkanian shall, during the period of this contract agreement, as defined herein, be paid an annual salary, as Head Basketball Coach, of the sum of ..... per year. This salary is to be paid in the normal monthly method as Coach Tarkanian has heretofore received his University salary. This salary, it is acknowledged, is composed not only of Coach Tarkanian's heretofore base salary, but, as well, includes the University accepting and becoming responsible to Coach Tarkanian for those compensations heretofore received by Coach Tarkanian from the Rebels Boosters Club, as per the Rebels Boosters Club long-standing commitments for services rendered by Coach Tarkanian to the Rebels Boosters Club.

B. It is further our agreement and understanding that Coach Tarkanian's salary shall be a budget item and shall be paid from the budget of the University of Nevada Las Vegas Intercollegiate Athletic Department.

C. It is further our understanding and agreement that this entire salary of Coach Tarkanian shall be subject to cost of living increases or other salary adjustments as is granted to University employees by the University Board of Regents or the State Legislature.

D. As additional compensation, it is further agreed between the University and Coach Tarkanian that Coach Tarkanian shall be entitled and shall receive a merit bonus consisting of ten percent of the net proceeds received by the University of Nevada Las Vegas as a result of the Men's University Basketball Team being chosen for and participating in the NCAA Championship Basketball Tournament any year during which Jerry Tarkanian is Head Basketball Coach beginning in the 1983-84 basketball season and continuing during the entire period Jerry Tarkanian is Head Basketball Coach at the University of Nevada Las Vegas.

2. It is further agreed between the University of Nevada Las Vegas and Jerry Tarkanian that Jerry Tarkanian shall, effective with the signing of this contract be given the additional position of Assistant Athletic Director of the University of Nevada Las Vegas. This position shall be in addition to that of his present position as Head Basketball Coach of the University of Nevada Las Vegas, and, in this new position, Jerry Tarkanian shall have designated duties as Director of Community Relations for the Department of Intercollegiate Athletics in the community of Las Vegas and the State of Nevada. It is further agreed that Jerry Tarkanian shall serve in this position of Assistant Athletic Director for the compensations as set forth in paragraph 1 above.

3. It is further agreed between the University of Nevada Las Vegas and Jerry Tarkanian that at the time Jerry Tarkanian retires or for other reasons does not

continue his duties as Head Basketball Coach at the University of Nevada Las Vegas, however chooses to continue employment at the University of Nevada Las Vegas, Jerry Tarkanian shall remain employed by the University of Nevada Las Vegas and shall have the choice of either (1) remaining full time in his position as Assistant Athletic Director, with designated duties of community-relations, answerable to the Athletic Director; or (2) becoming a full-time University employee, with the title and portfolio of Director of Community Relations for Thomas-Mack Arena and, in such employment position shall be answerable and responsible in this capacity to either the Athletic Director, the University President or the Thomas-Mack Arena Director, as can be mutually agreed upon between the University of Nevada Las Vegas and Jerry Tarkanian. It is further agreed and acknowledged between the parties that at the time that Jerry Tarkanian chooses his options under this paragraph and is no longer Head Basketball Coach at the University of Nevada Las Vegas, his salary shall revert to the base salary as defined in paragraph 1A, with any increases or increments having been added to said base salary during the term of this contract agreement. It is acknowledged, for purposes of this agreement, that at the time of the execution of this agreement, the base salary is approximately ..... per year.

4. It is further agreed between the University of Nevada Las Vegas and Jerry Tarkanian that it is in the best interests of both parties that Jerry Tarkanian be allowed to conduct basketball training camps on and through the use of the facilities of the University of Nevada Las Vegas, the benefit to the University being that it allows the youth of the community and surrounding

areas to become acquainted with the University of Nevada Las Vegas and its facilities and provides social and athletic training to the youth without cost to the University of Nevada Las Vegas. Therefore, it is agreed between the parties that Jerry Tarkanian shall be allowed to use the required and necessary facilities upon the campus of the University of Nevada Las Vegas for the conducting of the Jerry Tarkanian Basketball Training Camps. These facilities shall include the dormitory, food services, gymnasiums, locker rooms, etc. It is further agreed that the University shall charge Jerry Tarkanian, for the use of these facilities, its actual cost in making these facilities available to Jerry Tarkanian, said cost to be substantiated and broken down for clarification at the request of Jerry Tarkanian, with the intent and purpose to allow Jerry Tarkanian to have successful training camps upon the campus of the University of Nevada Las Vegas at a reasonable and competitive cost to the public youth. It is acknowledged by Jerry Tarkanian that the availability of these facilities is subject to the University of Nevada Las Vegas' first obligation in the use of the facilities for credit courses and that his basketball camps are to be scheduled on a space available basis so as not to conflict with the University of Nevada Las Vegas' summer school courses.

5. It is further agreed between the University of Nevada Las Vegas and Coach Jerry Tarkanian that Jerry Tarkanian will be kept fully informed and advised of any and all selection processes for any new Athletic Directors and will be made a member of any selection committee appointed for the purpose of interviewing and making recommendations and comments for the hiring of any new Athletic Directors at the University of Nevada

Las Vegas. If a selection committee is not appointed, it is agreed by all parties that Jerry Tarkanian will be provided an opportunity to express his comments and recommendations and to participate in the selection process prior to a final commitment being made to hire Athletic Directors. The provisions of this paragraph shall apply only so long as Jerry Tarkanian retains the position of Head Basketball Coach at the University of Nevada Las Vegas.

6. It is further agreed that nothing in this letter of agreement shall be interpreted as eliminating or otherwise restricting or affecting any other legal rights that Jerry Tarkanian presently possesses or would in the future possess or be entitled to as a result of his employment at the University of Nevada Las Vegas, including, but not limited to, tenure, medical benefits, vacation periods, retirement benefits, etc.

7. It is further agreed between the parties that it is in the best interests of the University of Nevada Las Vegas that Jerry Tarkanian remain as Head Basketball Coach for an extended period of time. Therefore, the University agrees as follows:

A. That it shall be the prerogative and contractual right of Jerry Tarkanian to remain as Head Basketball Coach at the University of Nevada Las Vegas under the terms of this contract for a period of three years, beginning in July, 1983, and continuing for three school calendar years thereafter, with the clarification that this three-year contract right of Jerry Tarkanian shall be on a renewable basis. By further definition, this means that at the end of each one year of this contract agreement, Jerry Tarkanian shall be entitled to a renewed three-year

period to remain as Head Basketball Coach at the University of Nevada Las Vegas and, therefore, shall always be in a position of having a three-year contract right with the University of Nevada Las Vegas.

B. Notwithstanding any other provisions of this contract, Jerry Tarkanian, during any renewable three-year period that the University is obligated to retain him as Head Basketball Coach, is granted the following options and contract rights:

(1) To retire as Head Basketball Coach at the University of Nevada Las Vegas for conditions which, in the opinion of Coach Tarkanian, his family, or physicians, his health no longer permits him to continue in the position as Head Basketball Coach. In this instance, Jerry Tarkanian shall be entitled to exercise all rights as a University employee, as set forth in paragraphs 3 and 4 above, with the understanding that at any time Jerry Tarkanian quits coaching basketball and remains at the University of Nevada Las Vegas, his salary shall be reduced to that base salary as it then exists.

(2) Jerry Tarkanian may, if he so chooses and without necessity of justification, for his own personal and professional reasons, retire as Head Basketball Coach at any time during any of the renewable three years of his contract rights, with the understanding that he may, in such instance, exercise his prerogative to remain employed by the University of Nevada Las Vegas and retain certain rights of his employment, as are more specifically set forth in paragraphs 3, 4 and 6 above.

(3) Jerry Tarkanian may at any time while this agreement is in force and effect, upon written notice

to the University and without any necessity of justification or cause, exercise his option of relieving himself of his duties as Head Basketball Coach at the University of Nevada Las Vegas and as an employee of the University of Nevada Las Vegas, without penalty, and to seek employment or retirement elsewhere, and thereupon both parties will be relieved of any further obligations under this agreement.

This contract shall become complete and binding upon the University and Jerry Tarkanian upon being executed by Jerry Tarkanian, on behalf of himself, and Bradley L. Rothermel, Athletic Director of the University of Nevada Las Vegas, and Leonard E. Goodall, President of the University of Nevada Las Vegas, on behalf of the University of Nevada Las Vegas.

Very truly yours,

/s/ Charles E. Thompson
Charles E. Thompson

CET: mr

The terms of the foregoing agreement accepted on behalf of JERRY TARKANIAN this 28th day of February, 1983.

/s/ Jerry Tarkanian
Jerry Tarkanian

The terms of the foregoing agreement accepted on behalf of the UNIVERSITY OF NEVADA LAS VEGAS this 28th day of February, 1983.

/s/ Bradley L. Rothermel
Bradley L. Rothermel
Athletic Director
/s/ Leonard E. Goodall
Leonard E. Goodall
President

FIRST ADDENDUM TO LETTER OF AGREEMENT

COME NOW, JERRY TARKANIAN and the UNIVERSITY OF NEVADA, LAS VEGAS and make this First Addendum to that Letter of Agreement dated February 17, 1983, and executed on February 28, 1983.

1. Paragraph 7A on page 4 of this February 17, 1983 contract is interpreted to guarantee Mr. Jerry Tarkanian an initial three-year contract as Head Basketball Coach which will be automatically renewed at the end of each year unless the University serves a timely notice of termination which would allow the contract to cease at the end of the designated term.

All other provisions and paragraphs of the Letter of Agreement between the parties dated February 17, 1983, and executed on February 28, 1983, shall remain in full force and effect.

The terms of the foregoing FIRST ADDENDUM TO LETTER OF AGREEMENT accepted on behalf of JERRY TARKANIAN this 20 day of June, 1983.

/s/ Jerry Tarkanian
Jerry Tarkanian

The terms of the foregoing FIRST ADDENDUM TO LETTER OF AGREEMENT accepted on behalf of the UNIVERSITY OF NEVADA LAS VEGAS this 30th day of June, 1983.

/s/ Bradley L. Rothermel
Bradley L. Rothermel
Athletic Director
/s/ Leonard E. Goodall
Leonard E. Goodall
President

PLAINTIFF'S TRIAL EXHIBIT #25

CONFIDENTIAL REPORT NO. 123 (47)

By the NCAA Committee on Infractions
to the
NCAA COUNCIL

Case No. 443 - University of Nevada, Las Vegas

This report is filed in accordance with Section 6 of the Official Procedure Governing the NCAA Enforcement Program, and is organized in five sections, as follows:

I. Violations of NCAA requirements or questionable practices in light of NCAA requirements, as determined by Committee.

II. Penalty to be imposed upon institution, as proposed by Committee.

III. Origin of case.

IV. Related factors appropriate for consideration in judgment of case.

V. Disciplinary or corrective actions taken by institution or conference, or any other agency involved in particular incident.

Pursuant to the appeal initiated by the University of Nevada, Las Vegas, under Section 5 of the Official Procedure Governing the NCAA Enforcement Program, the Committee on Infractions will submit Report No. 123(47) to the Council of the National Collegiate Athletic Association at its meeting in Knoxville, Tennessee, August 22, 1977.

Case No. 443

[University of Nevada, Las Vegas]

[NOTE: The NCAA MANUAL citations in this report are from the 1976-77 NCAA MANUAL which was in effect at the time the Committee on Infractions' initial Confidential Report No. 123 (47) was forwarded to the University of Nevada, Las Vegas. Each finding of violation appealed by the University of Nevada, Las Vegas, is identified by an asterisk (*). Information submitted by the Committee on Infractions related to each appealed finding of violation directly follows the finding and is separated by a line.]

I. Violations of NCAA requirements or questionable practices in light of NCAA requirements, as determined by Committee.

A. Violations of the principles governing expenses, extra benefits and financial aid to student-athletes [NCAA Constitution 3-1-(g)-(5), 3-1-(g)-(6) and 3-4-(a)].

1. During the 1971-72 academic year, then head basketball coach John Bayer arranged for student-athlete Dan Cunningham to be provided the benefit of round-trip commercial airline transportation at no cost to Cunningham between Las Vegas, Nevada, and his home in Salinas, California, in order for the young man to return home for Christmas vacation.

*2. In November 1973, through the arrangements of head basketball coach Jerry Tarkanian and Frank Denton, a representative of the

University's athletic interests and operator of the American Tour and Travel Service, Las Vegas, Nevada, student-athlete Robert "Jeep" Kelley was provided one-way airline transportation at no charge to Kelley from Las Vegas, Nevada, to his home in Pittsburgh, Pennsylvania; further, at the time the young man returned to the University, Tarkanian reimbursed Kelley in cash for the cost of one-way commercial airline transportation from Pittsburgh to Las Vegas.

The Committee's finding is based upon information reported to the NCAA by Robert Kelley on May 15, 1975. It should be noted that the University does not dispute that Kelley traveled from Las Vegas to Pittsburgh in November 1973, and returned to Las Vegas after remaining in Pittsburgh for several days. Further, there is no dispute that the cost of the return trip to Las Vegas was initially paid through the arrangements of Kelley's former high school principal, James Robinson.

However, based primarily upon information developed by the institution in its review of this allegation with Jerry Tarkanian and Kelley, the University denies that the initial trip was arranged by Jerry Tarkanian and Frank Denton, and denies that Tarkanian reimbursed Kelley for the costs incurred to return to Las Vegas. After reviewing all the information reported in this case, the

Committee has concluded that Kelley provided the NCAA accurate information during his initial May 15, 1975 interview even though information he later reported to the University was substantially different. Basically, the Committee believes that Kelley was improperly encouraged and pressured to provide the University false information during its investigation of this matter as described by the young man and his aunt, Frances Parker, in Part I-F-1 of this report. Also, no information has been reported to the Committee which would satisfactorily explain why Kelley would report false information to the NCAA during his initial May 15, 1975, interview.

It should be noted the University has charged that the information upon which the Committee bases its conclusion was never reported to the NCAA by Kelley. The Committee has carefully considered this question as described in Part IV-E of this report. In addition, please note Part IV-C of this report further explains the Committee's thinking with regard to the University's investigation of allegations involving Kelley.

The University has indicated it does not believe Denton should be considered a representative of the University's athletic interests. In this regard, the Committee notes that in correpondence exchanged between Denton and Tarkanian during the summer 1973, Denton offered to arrange cost-free, personal

air travel for Jerry Tarkanian, his family, assistant coaches, friends and athletes on "junket" flights. It should also be noted that Tarkanian did not decline this offer of assistance from Denton for members of the University's basketball team, and actually identified Kelley as an individual who could benefit from this service. As the Committee and Council have found in numerous cases in the past, when an individual becomes associated with the promotion of an institution's intercollegiate athletic program (i.e., by contacting a member of the University's coaching staff to offer assistance to student-athletes) such an individual is considered to be a representative of the University's athletic interests, and the University becomes responsible for his actions to assist student-athletes. Further, the Committee believes the University is well aware of its responsibility in this regard, and notes that Tarkanian wrote a June 11, 1973, letter to Denton describing the application of NCAA regulations to Denton's offer of assistance.

*3. During the 1973-74 academic year, head basketball coach Jerry Tarkanian provided student-athlete Robert "Jeep" Kelley the name and telephone number of Frank Denton, a representative of the University's athletic interests and operator of the American Tour and Travel Service, Las Vegas, for the purpose of assisting Kelley in obtaining personal airline transportation at no cost to him; further, after Kelley followed Tarkanian's instructions, Denton actually arranged for the young man to receive the benefit of round-trip airline transportation at no cost to Kelley between Las Vegas and Pittsburgh at the time he visited his home at the conclusion of the 1973-74 basketball season and again during August or September 1974, prior to the start of classes for the 1974-75 academic year.

The Committee's finding is based upon information provided to the NCAA by Robert Kelley on May 15, 1975. It was noted that in reporting this information, Kelley not only identified Frank Denton as the individual arranging this transportation but also recalled the telephone number of Denton's place of business, American Tour and Travel Service. The Committee believes it is unlikely Kelley would have recalled this number unless he had occasion to utilize Denton's services as described. The University bases its position primarily upon information developed during its interviews with Tarkanian, Denton and Kelley. In this regard, the Committee again directs the Council's attention to Parts I-F-1, IV-C and IV-E of this report for additional information concerning the Committee's position in regard to allegations involving Kelley.

The Committee believes Denton is a representative of the University's athletic interests

for the reasons set forth in Part I-A-2 of this report. In addition, the Committee asks the Council to note that in regard to this finding, Kelley would not have been in a position to receive the benefit of cost-free airline transportation without the assistance of Tarkanian in contacting Denton, thereby establishing a relationship between Denton and the University's basketball coaching staff which led directly to the violation in question.

It should be noted the Committee does not accept the University's contention that the benefit of cost-free airline transportation on "junket" flights is available to *all* members of the University's student body in general. Rather, information reported to the Committee indicates that this benefit is limited to individuals satisfying certain conditions established by the operators of such flights. Such conditions include a personal interview to insure the flight is a matter of necessity and not pleasure, receipt of a request from a friend of the junket operator, or a specific offer of assistance to selected individuals by the junket operator. Information has not been reported to establish that *all* students enrolled in the University who desire to travel are permitted to take advantage of this benefit at the discretion of the student. In fact, Denton's June 6, 1973, letter to Tarkanian offers this service only to Jerry Tarkanian, his family, assistant coaches, friends and athletes.

*4. Through the arrangements of Frank Denton, a representative of the University's athletic interests and operator of the American Tour and Travel Service, Las Vegas, Nevada, student-athlete Ricky Sobers received the benefit of personal airline transportation at no cost to him between Las Vegas and his home in New York on at least one occasion during his attendance at the University (1973-74 and 1974-75 academic years).

The finding is based upon information initially reported to the NCAA by Ricky Sobers on August 14, 1975.

The University contends that although Sobers received the benefit of cost-free transportation on one occasion, it was not through Denton's arrangements. In considering this matter, the Committee was unable to determine why Sobers would initially report to the NCAA that Denton arranged the transportation in question if, in fact, he did not. To review additional information concerning the reasons the Committee accepts Sobers' initial report to the NCAA, rather than the change in detail related to Denton's involvement which was developed in the University's interview with Sobers, the Council's attention is directed to Part IV-C of this report. Further, the Committee believes Denton is a representative of the University's athletic interests for the reasons cited in Part I-A-2

of this report. The Committee also notes that in Tarkanian's June 11, 1973, letter to Denton, Sobers is identified as an individual who could benefit from Denton's services.

B. Violation of the principles governing extra benefits to student-athletes [NCAA Constitution 3-1-(g)-(6)].

*1. During the 1972-73 academic year, then head basketball coach John Bayer arranged for student-athletes Pat Bolster and Dan Cunningham to be provided entertainment at one or more dinner shows featuring Buddy Hackett and Charo at the Sands Hotel in Las Vegas at no cost to the young men; further, on one occasion, Bolster's parents accompanied the young men at no charge to them.

The Committee's finding is based upon information reported to the NCAA by Dan Cunningham on January 18, 1974, as well as by Pat Bolster on March 8, 1976. The University agrees that Bayer made reservations on at least one occasion for these young men but indicates that Bayer was unaware the young men would not be required to pay the costs associated with this entertainment. The Committee believes it is unlikely that the young men would have found it necessary to ask Bayer to make these reservations in this instance unless they expected to receive a special benefit. Further, Cunningham confirmed to the NCAA that he never expected to pay the costs associated with this entertainment.

C. Violations of the principles governing extra benefits and financial aid to student-athletes [NCAA Constitution 3-1-(g)-(6) and 3-4-(a)].

1. During the 1971-72 and 1972-73 academic years, then head basketball coach John Bayer gave student-athlete Dan Cunningham a monthly cash allowance of approximately $100, which was not administered by the University's regular scholarship awards authority, in addition to a full institutional grant-in-aid which Cunningham already was receiving.

*2. During the 1971-72 and 1972-73 academic years, then head basketball coach John Bayer gave student-athlete James Baker a monthly cash allowance of approximately $50, which was not administered by the University's regular scholarship awards authority, in addition to a full institutional grant-in-aid which Baker was already receiving.

The Committee's finding is based on information reported by John Bayer to the NCAA on April 3, 1974. On that occasion, Bayer described in detail negotiations he conducted with Baker when the young man threatened to transfer from the University unless he was provided a cash allowance; further, Bayer reported that these negotiations re-

sulted in the provision of a cash allowance of $50 per month to Baker. It should be noted that student-athlete James Baker refused to be interviewed by the NCAA in this case, although he has stated to the University that this information is false. Also, Bayer later denied to the University that he provided this allowance to Baker. The Committee believes that Bayer reported accurate information in his first interview with the NCAA based on his recollection of specific details related to negotiations resulting in the provision of this allowance to Baker. The Committee notes that during the period of time in question, Bayer was providing $100 cash per month to another student-athlete as set forth in Part I-C-1 of this report.

*3. During the 1972-73 academic year, student-athlete James Baker was provided the use of a 1973 Ford Thunderbird automobile at no cost to the young man; further, the automobile was obtained by the young man from the Sam Krug Chrysler-Plymouth agency which was owned by Sam Krug and Art Thomas, representatives of the University's athletic interests.

After reconsideration of this finding in light of the University's appeal, the Committee agrees that there is not sufficient information to warrant a finding in this instance. Accordingly, the Committee withdraws this finding and requests the Council to delete it from this report.

In the Committee's judgment, the deletion of this finding should not affect the proposed penalty in this case, other than to remove the names of Sam Krug and Art Thomas from the list of representatives of the University's athletic interests to be severed from the institution's intercollegiate athletic program as set forth in Part II-F-3 of this report.

*4. During the 1971-72 and 1972-73 academic years, then head basketball coach John Bayer and Richard Davis, Fair and Davis Real Estate Company and a representative of the University's athletic interests, arranged for selected members of the University's intercollegiate basketball team to reside in the Flamingo East Apartments, Las Vegas, Nevada, at no cost to the young men; further, each of the student-athletes continued to receive a full athletic grant-in-aid at the University, including a room allowance while residing cost free in these apartments; finally, among the student-athletes who have enjoyed this benefit during their attendance at the University are James Baker, Don Weimer, Eddie Taylor and Dan Cunningham.

This finding is based primarily upon information reported to the NCAA on December 16, 1975, by Noel Pion, former manager

of the Flamingo East Apartments. Pion reported that Richard Davis agreed to provide former head basketball coach John Bayer an apartment on a cost-free basis. Bayer then made this apartment available to selected student-athletes on a rent-free basis. Pion reported that student-athletes James Baker, Dan Cunningham, Eddie Taylor and Don Weimer resided in this apartment at no personal expense through these arrangements. The University acknowledges that at least three of the student-athletes in question (Baker, Taylor and Weimer) did, in fact, reside at the Flamingo East Apartments for a period of time, but has appealed this finding based on information developed in interviews with the young men and Richard Davis. To review additional information concerning the reasons the Committee accepts the information provided by Pion as opposed to that reported by the former student-athletes in question and Davis, the Council's attention is directed to Part IV-C of this report.

The Committee has identified Davis as a representative of the University's athletic interests based on the fact that he has made available an apartment to the University's athletic department for several years to house coaches visiting Las Vegas, and because he is a former secretary-treasurer of the University's athletic booster club.

*5. During a portion of the 1973-74 and 1974-75 academic years, Mr. and Mrs. Burrell Cohen, representatives of the University's athletic interests, permitted student-athlete Robert "Jeep" Kelley to reside cost free in their home in Las Vegas.

The Committee's finding is based upon information reported to the NCAA by Robert Kelley initially on May 15, 1975, and again on March 5, 1976. Kelley initially indicated in 1975 he resided cost free in the Cohen home as described in this finding. On March 5, 1976, Kelley reported to the NCAA that the Cohens had contacted him to request that he report to the NCAA that he paid $70 rent per month during the period he resided in the Cohen home. The Committee notes that this request was made after Mr. and Mrs. Cohen's January 15, 1976, interview with an NCAA enforcement representative, at which time the Cohens reported that Kelley had paid $75 per month for rent. It is the Committee's belief that Cohen requested Kelley to report inaccurate information in order to corroborate the false information the Cohens already had provided the NCAA. The Committee also directs the Council's attention to Parts I-F-1, IV-C and IV-E of this report which present additional information concerning the Committee's position in regard to allegations involving Kelley.

It should be noted that during the summer 1973, Cohen wrote Jerry Tarkanian to advise him of plans to assist Kelley in adjusting to college life. In addition, Cohen contacted Tarkanian at the time Kelley established residence in the Cohen home and discussed the arrangements for the young man's lodging. It is the Committee's position that these actions establish Cohen and his wife (who was also involved in these arrangements) as representatives of the University's athletic interests for purposes of applying NCAA regulations.

*6. During the 1973-74 academic year, head basketball coach Jerry Tarkanian arranged for student-athlete Robert "Jeep" Kelley to be given a shirt and two pairs of slacks at no cost to the young man by a salesman at a Mr. Slacks clothing store, Las Vegas, Nevada.

The Committee's finding is based upon information reported to the NCAA by Robert Kelley on May 15, 1975. Kelley stated that he obtained the shirt and slacks through the arrangements of Tarkanian as found by the Committee.

The University's appeal is based primarily on information developed during its interviews with Kelley. As previously noted, the Committee believes that after Kelley provided information to the NCAA related to this and other findings, he was improperly

encouraged and pressured to provide the University false information. In this regard, the Committee again directs the Council's attention to Parts I-F-1, IV-C and IV-E of this report.

*7. On one occasion during the 1973-74 or 1974-75 academic year, student-athlete Ricky Sobers was given a suede jacket, a pair of slacks and at least two shirts by a salesman at a Mr. Slacks clothing store, Las Vegas, Nevada.

The Committee's finding is based upon information reported to the NCAA by Ricky Sobers on August 14, 1975. Sobers reported he was given these items of clothing by a salesman at the identified clothing store in recognition of two victories by the University's intercollegiate basketball team. Although substantially different information was developed by the University during its interview with Sobers, the Committee was unable to determine why Sobers would initially report this information to the NCAA if, in fact, it was not true. For additional information concerning the reasons the Committee accepts the information initially reported by Sobers, the Council's attention is directed to Part IV-C of this report.

It should be noted that the Committee did not consider this finding in determining an institutional penalty in this case. Although

it is clear in the Committee's opinion that this clothing was provided to Sobers because he was an athlete, the Committee was unable to determine whether the involved salesman was a representative of the University's athletic interests. Therefore, the Committee did not believe the University should bear any institutional responsibility for the violation.

*8. During the 1973-74 and 1974-75 academic years, student-athlete Ricky Sobers received the benefit of numerous meals at no cost to him at the Las Vegas Hilton Hotel through the arrangements of Howard Kincaid, a representative of the University's athletic interests; further, Sobers was receiving a full athletic grant-in-aid at the University, including a meal allowance, at the time he was receiving this benefit.

The Committee's finding is based upon information reported to the NCAA by Ricky Sobers on August 14, 1975. Further, both Sobers and Howard Kincaid confirmed the substance of this finding in their interviews with the University. However, it is the position of the University that Kincaid should not be considered a representative of the institution's athletic interests, and that the meals in question should be considered permissible pre-game meals incidental to Sobers' participation in intercollegiate basketball competition.

In this regard, the Committee notes that the University has no records to support the provision of these meals to Sobers as part of the actual and necessary expenses related to his participation on the University's basketball team; further, Sobers initially reported to the NCAA that he could and did obtain complimentary meals through Kincaid's arrangements any time he (Sobers) so desired.

In addition, the Committee believes that Kincaid must be considered a representative of the University's athletic interests inasmuch as he has assisted members of the University's basketball coaching staff by arranging the provision of complimentary meals and entertainment for college basketball coaches visiting the Las Vegas area and, therefore, is involved in promoting the University's intercollegiate athletic program; further, Kincaid was fully aware of Sobers' participation as a member of the University's basketball team at the time he provided complimentary meals for the young man.

D. Violation of the principles governing institutional control [NCAA Constitution 3-2].

*1. The involvement of Ann Cohen, Burrell Cohen, Richard Davis, Frank Denton, Howard Kincaid, Sam Krug, Harvey Munford, Rodney Parker, Art Thomas and Brad Welch, representatives of the University's athletic interests, in numerous violations set forth

in this report demonstrates that the University of Nevada, Las Vegas, did not adequately exercise institutional control and responsibility over these individuals.

If the Committee's other findings set forth in this report involving the identified representatives are accepted or upheld for the most part by the Council, the Committee believes this finding to be supported without need for further explanation or justification. The parts of this report involving each individual are: Ann Cohen, I-C-5; Burrell Cohen, I-C-5; Richard Davis, I-C-4; Frank Denton, I-A-2, I-A-3 and I-A-4; Howard Kincaid, I-C-8; Harvey Munford, I-H-6 and I-H-7; Rodney Parker, I-K-1, I-M-1 and I-N-3, and Brad Welch, I-M-1.

[NOTE: The names of Sam Krug and Art Thomas should be deleted from this finding in light of the Committee's action to withdraw its finding as set forth in Part I-C-3 of this report.]

E. Violations of the principles governing ethical conduct [NCAA Constitution 3-6-(a)].

*1. Former head basketball coach John Bayer as well as present head basketball coach Jerry Tarkanian acted contrary to the principles of ethical conduct inasmuch as they did not, on all occasions, deport themselves in accordance with the generally recognized high standards normally associated with the

conduct and administration of intercollegiate athletics, in that their involvement in various violations in this case demonstrates a knowing and willful effort on their part to operate the University's intercollegiate basketball program contrary to NCAA legislation.

If the Committee's other findings set forth in this report involving Jerry Tarkanian are accepted or upheld for the most part by the Council, the Committee believes this finding to be supported without need for further explanation or justification. The parts of this report involving Tarkanian are I-A-2, I-A-3, I-C-6, I-F-1, I-H-7, I-M-1 and I-O-2. It should be noted that this finding, as it relates to John Bayer, is not being appealed by the University.

F. Violation of the principles of ethical conduct and the cooperative principles governing the NCAA enforcement program [NCAA Constitution 3-6-(a), Bylaw 7-5-(d) and the opening statement of the Official Procedure Governing the NCAA Enforcement Program].

*1. During the course of the NCAA's investigation into the athletic policies and practices of the University's intercollegiate basketball program, Jerry Tarkanian contacted and arranged for other individuals to contact principals involved in the case in an effort to discourage them from reporting information related to violations of NCAA regulations

when contacted by members of the NCAA enforcement staff, and in an effort to cause them to give untruthful information to the University. Specifically, among the individuals who have been contacted for this reason by or through the arrangements of Tarkanian are former student-athlete Robert "Jeep" Kelley and Frances Parker, Port Chester, New York.

The Committee's finding is based on information reported to the NCAA by Robert Kelley and his aunt, Frances Parker, during a period beginning March 5, 1976, and ending December 10, 1976. It should be noted that during this period, the University was actively investigating allegations submitted to it by the NCAA in order to prepare a response to the Committee's February 25, 1976, official inquiry. Inasmuch as the Committee believes this finding is most serious, it wishes to call the following information to the Council's attention:

(a) On March 5, 1976, Mrs. Parker (Port Chester, New York) telephoned an NCAA investigator to report that Kelley (who was residing in Pittsburgh, Pennsylvania) was frightened because he had been told by Jerry Tarkanian that the attorney general from Nevada wished to question him in Nevada because he had provided information to the NCAA. Mrs. Parker also reported that she had

been contacted by Mrs. Burrell Cohen (Las Vegas, Nevada) who told her that certain unidentified individuals in Las Vegas wished to talk to her. Mrs. Cohen (identified in the finding set forth in Part I-C-5 of this report) stated that her husband (also identified in the finding set forth in Part I-C-5 of this report) would forward a airline ticket to Mrs. Parker to travel to Las Vegas to "look over the city." Mrs. Parker declined this offer.

(b) On March 5, 1976, an NCAA investigator telephoned Kelley. Kelley reported that Tarkanian recently had told him the attorney general from Nevada wanted to talk with him. Kelley said he was reluctant to admit to Tarkanian that he had previously provided information to the NCAA, and indicated he was concerned in that he did not want himself or his family to be harmed based on his involvement in the case.

(c) On April 2, 1976, Mrs. Parker reported to the NCAA that Kelley had told her he felt obligated to assist Tarkanian in some way in order to insure that his half-brother (Sonny Lewis) would be able to participate in college basketball.

(d) On April 5, 1976, Mrs. Parker reported to the NCAA that Kelley's former high school principal, James Robinson, and

Kelley's former high school basketball coach, Spencer Watkins, were pressuring Kelley to sign a statement in Tarkanian's behalf and to travel to Las Vegas. Mrs. Parker reported these individuals told Kelley that if he refused to help Tarkanian it would affect the chances of Sonny Lewis (who was attending Kelley's former high school) to participate in collegiate basketball competition. Mrs. Parker said that Kelley no longer wished to be involved in providing information to the NCAA in this case because he was receiving excessive pressure to assist Tarkanian from individuals contacting him on Tarkanian's behalf. In this regard, she reported that an attorney from Pittsburgh named DeCello also was attempting to contact Kelley.

(e) Later on April 5, Mrs. Parker telephoned an NCAA investigator to report that Sonny Lewis had just advised her by telephone that Kelley left earlier that afternoon for Las Vegas. Kelley apparently planned to be employed by a construction company in Las Vegas. Further, Lewis told Mrs. Parker that Kelley did not have funds to purchase the airline ticket for this trip, and that someone had provided the ticket for him.

(f) On April 2[1] 1976, Mrs. Parker reported to the NCAA that Kelley telephoned her from the home of Burrell Cohen in Las

Vegas, where Kelley was residing. She reported that Kelley had been contacted by an attorney in Pittsburgh prior to leaving for Las Vegas; further, that a job had been arranged for Kelley in Las Vegas by Tarkanian and Cohen. Kelley reported to Mrs. Parker that he agreed to travel to Las Vegas in an effort to take pressure off of himself and his family in Pittsburgh.

(g) On April 22, 1976, Kelley telephoned an NCAA investigator and reported the following information. Kelley explained that Cohen had telephoned him in Pittsburgh to advise him that an attorney, Anthony DeCello, wished to talk to him. At the same time, Spencer Watkins, Kelley's former high school coach, was pressuring Kelley to travel to Las Vegas where he would be employed. DeCello, who described himself as an attorney representing the University of Nevada, Las Vegas, met with Kelley in Pittsburgh and then purchased an airline ticket for Kelley to travel that day from Pittsburgh to Las Vegas. Kelley said that he reported false information concerning this case during his conversation with DeCello in an attempt to show that he was on DeCello's side. Kelley also reported that he was residing cost free in the Cohen home while in Las Vegas and that Cohen had arranged to

provide him an automobile at no cost. Also, he indicated that Tarkanian had arranged a construction job for him.

(h) On May 11, 1976, Kelley telephoned an NCAA investigator and reported that Tarkanian was en route to the Cohen home to obtain Kelley's signature on some prepared statements. Kelley was concerned about what he should do inasmuch as he believed from his previous conversations with Tarkanian that the statements would contain false information designed to assist Tarkanian in defending himself against the NCAA. Kelley asked what effect his signing false statements would have upon the NCAA's case, and was told that he should attempt to be truthful in his statements to the University, but if he felt compelled to sign false statements, he should remain in contact with the NCAA to explain the reasons for his actions. Later that same evening, Kelley telephoned the NCAA investigator again to report that Tarkanian had, in fact, requested him to sign statements containing false information similar to that he previously had provided DeCello in Pittsburgh. However, Kelley telephoned Mrs. Parker in the presence of Tarkanian and was advised by his aunt not to sign the statements until she was able to review them. Kelley also reported that on this occasion Tarkanian had offered to arrange for him to try out with the Los Angeles Lakers professional basketball team or to arrange for him to participate in a summer basketball league conducted by a friend of Tarkanian's in Southern California.

(i) On May 12, 1976, Mrs. Parker telephoned an NCAA investigator and reported information corroborating Kelley's description of events occurring the previous evening involving herself, Kelley and Tarkanian. In addition, she indicated that Kelley was concerned about the pressure placed on him in Las Vegas. Mrs. Parker also recalled that Mrs. Lois Tarkanian had telephoned her on an earlier occasion, stating that if the "NCAA finds out anything," her husband (Jerry Tarkanian) would lose his job. Mrs. Parker viewed this telephone call as an attempt by Mrs. Tarkanian to persuade her not to report information against the interests of Jerry Tarkanian.

(j) In July 1976, Kelley telephoned an NCAA investigator and reported that he had returned to Pittsburgh and, in fact, had signed various false statements in Las Vegas at Tarkanian's request. Kelley reported that Tarkanian planned to assist him in enrolling in another collegiate institution, possibly somewhere in California. Kelley stated that he hoped his actions would not hurt the NCAA's case.

(k) On September 28, 1976, Mrs. Parker reported to an NCAA investigator that Kelley was planning to travel to California to enroll in a collegiate institution, but apparently was going to stop in Las Vegas on the way.

(l) On November 29, 1976, Kelley telephoned an NCAA investigator from Honolulu, Hawaii. Kelley reported that Tarkanian arranged for him to attend school in California, but at the last minute was able to arrange for him to receive a basketball scholarship at the University of Hawaii. Kelley reported that when he left Pittsburgh that September, Tarkanian had arranged for him to travel to Las Vegas on a "junket" flight via United Airlines at no cost to him. Upon arriving in Las Vegas, he resided in the Cohen home cost free for approximately three weeks before traveling on to Hawaii. Kelley reported that while residing in the Cohen home, he was requested to sign additional statements he described as containing "the same lies as before." Thereafter, Cohen gave Kelley approximately $600-$700 which he utilized to pay his transportation costs to Hawaii, as well as his living expenses prior to receiving scholarship assistance from the University of Hawaii.

The Committee believes the information reported to the NCAA during this period by

Kelley and Mrs. Parker clearly supports the finding that pressures were applied and various inducements were offered and provided in order to insure Kelley's assistance in protecting the interests of the University and Tarkanian in this case. Further, the Committee believes this finding represents a most serious violation of NCAA legislation in that Tarkanian's actions are contrary to and reflect disregard for the cooperative principles of the NCAA enforcement program and the basic principles of ethical conduct. In this regard, the Committee directs the Council's attention to the opening statement of the Official Procedure Governing the NCAA Enforcement Program adopted by the Association's membership. This statement reads as follows:

"Individuals employed by or associated with member institutions for the administration, the conduct or the coaching of intercollegiate athletics are, in the final analysis, teachers of young people. Their responsibility is an affirmative one, and they must do more than avoid improper conduct or questionable acts. Their own moral values must be so certain and positive that those younger and more pliable will be influenced by a fine example. Much more is expected of them than of the less critically placed citizen.

"All representatives of educational institutions are expected to cooperate fully with the NCAA investigative staff, Committee on In-

fractions and Council to further the objectives of the Association and its enforcement program. The enforcement procedures are an essential part of the intercollegiate athletic program of each member institution and require full and complete disclosure by all institutional representatives of any relevant information requested by the NCAA investigative staff, Committee on Infractions or Council during the course of an inquiry."

G. Violation of the principles governing eligibility of student-athletes, and the provisions governing recruiting and institutional eligibility for championship events [NCAA Constitution 3-9-(e); Bylaws 1-1-(a) and 4-6-(b)].

*1. In the summer following the 1970-71 academic year, then head basketball coach John Bayer arranged for prospective student-athletes Dan Cunningham, Salinas, California; James Baker, Philadelphia, Pennsylvania; Eddie Taylor, Philadelphia, Pennsylvania, and Don Weimer, Chula Vista, California to be provided the correct answers to questions contained on a precollege enrollment test prior to the time the test was to be administered to the young men at the institution; further, these arrangements were made by Bayer to insure that each young man achieved a high enough score on the test to qualify for athletically related financial assistance, practice and play during the 1971-72 academic year at the University under the prediction requirements of NCAA Bylaw

4-6-(b) [1.600 rule]; further, prior to the test, Bayer arranged for then assistant basketball coach Fred Albrecht to assist the young men in memorizing the correct answers to the test, as well as the questions to answer incorrectly in an effort to avoid calling attention to the young men's unusually high test scores; finally, these improperly achieved test scores were actually utilized by the University to establish each young man's eligibility for aid, practice and play during the 1971-72 academic year under the requirements of the 1.600 rule.

The Committee's finding is based upon information reported to the NCAA by Dan Cunningham in the presence of his parents in January 1974, as well as supporting information provided by John Bayer, Eddie Taylor and the parents of Don Weimer. In this regard, it should be noted that Bayer was interviewed by the NCAA on April 3, 1974, concerning this matter. Following a description by the NCAA investigator of his understanding of the information set forth in this finding (i.e., that the young men were actually given the correct answers to the test in question, and were also told which questions should be answered incorrectly), Bayer confirmed at that time that the NCAA was aware of "what went on with the test." Further, Bayer then suggested that the NCAA investigate testing procedures utilized in sit-

uations involving several additional athletes enrolled in the University. The Committee believes Bayer's comments represent an acknowledgement of the facts of this finding, and the Committee asks the Council to also note that at the time he was initially confronted with this information by the NCAA, Bayer did not make any statement to deny the facts set forth in this finding.

Further, Dan Cunningham has confirmed the information set forth in this finding in his interview with the Universisty. Although Bayer and Taylor have provided substantially different information to the University than they initially reported to the NCAA, the Committee accepts the information originally provided by these individuals and in this regard again directs the Council's attention to Part IV-C of this report.

The Committee also notes that based on a review of each young man's academic background and previous test scores, it appears highly improbable that the young men could have achieved legitimately the scores credited to them in this instance. In this regard, the Committee believes the information reported by the principals in this situation is sufficient to support the Committee's finding; however, it should be noted that additional data concerning each young man's actual test scores and academic background is a matter of record in this case and is available for the Council's consideration.

It should also be noted that the provision of transportation for each young man's visit to Las Vegas for the administration of this test is acknowledged by the University and is set forth in Part I-J-1 of this report.

The University has asserted that this finding, if upheld by the Council, would not represent a violation of NCAA Bylaw 1-1-(a) [improper inducements]. In this regard, the Committee notes that both the Council and the Committee have found in past cases that arrangements to credit prospective student-athletes with improperly achieved scores on precollege enrollment tests have been considered improper inducements to encourage the prospective student-athletes to enroll in the involved institutions. In fact, without such assistance the prospects in question probably would not have qualified for athletically related financial aid, practice and play during their freshman years in residence and likely would have attended different collegiate institutions. Examples of previous cases involving similar findings are California State University, Long Beach; McNeese State University, and the University of Southwestern Louisiana.

H. Violations of the provisions governing recruiting [NCAA Bylaw 1-1-(a)].

1. In April 1971, in an effort to encourage the enrollment of prospective student-athlete Chad Meyer, Lodi, California, then head

basketball coach John Bayer promised the young man that he would arrange for Meyer to purchase a new automobile at a cost of approximately $400-$500 during his attendance at the University.

2. During the 1970-71 academic year, while recruiting prospective student-athlete Chad Meyer, Lodi, California, then head basketball coach John Bayer promised to arrange for the young man's parents to be provided air transportation to Las Vegas at no cost to the Meyers in order to attend basketball games in which their son would be participating as a member of the University's intercollegiate basketball team; further, Bayer promised to arrange cost-free lodging in Las Vegas for the young man's parents during these trips.

3. In April 1971, then head basketball coach John Bayer arranged for a representative of the University's athletic interests, who was a member of the dental profession in Las Vegas, to promise then prospective student-athlete Chad Meyer, Lodi, California, and his mother that the young man would receive cost-free dental care during his attendance at the University.

*4. In April 1971, during the official paid visit to the University's campus of prospective student-athlete Maurice Presley, Houston, Texas, then head basketball coach John Bayer promised to arrange for Presley to be given

a new automobile during his attendance at the University.

The Committee's finding is based upon information reported to the NCAA on March 1 and 2, 1973, during separate interviews with Maurice Presley, Presley's father and Walter Yates, the young man's former high school basketball coach. The Committee believes the Council should note that all three individuals were present when this offer was made and each reported similar details related to the promise by Bayer. In this regard, each individual (Presley, his father and Yates) identified the same location (i.e., a Las Vegas automobile agency) where the offer was made by Bayer. In addition, it should be noted that during the time in question, Bayer was involved in the offer of various improper inducements to other prospective student-athletes (reference: Parts I-H-1, I-H-2, 3 and 5 of this report) which are not the subject of appeal by the University in this case.

The University's appeal of this finding is based on information developed in its interviews with Presley, his father, Yates and Bayer. The Committee has considered this conflicting information and accepts the original statements of Presley, his father and Yates on the basis that these individuals would have no reason or opportunity to re-

port the alleged violation in detail in separate interviews if, in fact, no offer had been made by Bayer. In addition, the Committee again directs the Council's attention to Part IV-C of this report.

5. In April 1971, in an effort to encourage the enrollment of prospective student-athlete Ed McPheters, Stockton, California, then head basketball coach John Bayer promised McPheters that he would arrange for the young man to receive the following benefits during his attendance at the University: (a) a sum of money; (b) a new wardrobe, and (c) a new Camaro automobile.

*6. During the 1973-74 academic year, Harvey J. Munford, a representative of the University's athletic interests, cosigned a note at the Mediterranean Furniture Company in Las Vegas in order for prospective student-athlete David Vaughn to purchase furniture at a cost of approximately $600; further, Munford eventually paid approximately $400 from his own personal funds to retire the note.

The Committee's finding is based on information initially reported by Harvey Munford to the NCAA on October 8, 1975, and confirmed by Munford in his interview with the University. However it is the University's position that although Munford did sign the note in question, he should not be

considered a representative of the institution's athletic interests.

The Committee believes Munford is a representative of the University's athletic interests for the following reasons: (a) Munford was a part-time employee at the University and reported to the NCAA that he has been closely associated with members of the University's coaching staff for several years; (b) Munford reported that he has assisted the University in recruiting, including during the 1973-74 academic year, when he was requested by Jerry Tarkanian to assist in the recruitment of prospective student-athlete David Vaughn at the time the young man made his official paid visit to the University's campus; (c) Munford reported that through the encouragement of Jerry Tarkanian and assistant basketball coach Tony Morocco, he occasionally contacted prospective student-athlete David Vaughn and his wife for recruiting purposes during the 1973-74 academic year, and (d) if the Council accepts the Committee's finding as set forth in Part I-H-7 of this report, Tarkanian requested Munford to assist prospective student-athlete David Vaughn as described therein.

Although Munford acknowledges cosigning the note in question, the University also asserts that Munford signed this note in an effort to encourage Vaughn to participate in

an AAU basketball tournament. The Committee notes that even if this was the case, which the Committee does not believe, it would not be permissible for a representative of the University's athletic interests to cosign such a note for a prospective student-athlete. Further, the Committee believes Munford signed this note because he was encouraged to do so by a member of the University's basketball coaching staff as reported initially by Munford to the NCAA on October 8, 1975, and again on November 9, 1976. The Committee notes that Munford has been contacted on several occasions by the NCAA, and that Munford first identified Jerry Tarkanian and then assistant basketball coach Tony Morocco as the individuals encouraging him to cosign this note. The Committee believes Munford's present claim that none of the University's coaches encouraged him to cosign the note, as reported during his interviews with the University, represents an attempt by Munford to remove himself from involvement in this case. The Committee believes Munford initially provided accurate information to the NCAA and again directs the Council's attention to Part IV-C of this report for additional information in this regard.

*7. During the 1973-74 academic year, head basketball coach Jerry Tarkanian arranged for Harvey J. Munford, a representative of the University's athletic interests and a part-time

instructor at the University, to provide prospective student-athlete David Vaughn a "B" grade in a course taught by Munford at the University (The Role of Black Development in America) with the understanding that Vaughn would not attend any classes or do any course work.

The Committee's finding is based upon information initially reported to the NCAA by Harvey Munford on October 8, 1975, and confirmed in an interview with the NCAA on February 27, 1976. It should be noted that when contacted during the University's review of this matter, Munford denied reporting this information to the NCAA. In this regard, the Committee notes that prior to Munford's October 8, 1975, interview, the NCAA was not in possession of specific information concerning Munford's relationship with prospective student-athlete David Vaughn or the young man's enrollment in the class identified in this finding. However, when Vaughn's University of Nevada, Las Vegas, transcript was obtained subsequent to this initial interview, the transcript corroborated information provided by Munford to the extent that Vaughn, in fact, had been enrolled in the class identified in this finding, and had been credited with a "B" grade.

The Committee believes it unlikely that Munford would have initially provided the specific detailed information set forth in this

finding, if the information was not accurate. Also, the Committee notes that although on February 27, 1976, Munford confirmed this information to the NCAA, he also reported that when faced with the prospect of being interviewed by officials of the University of Nevada, Las Vegas, he was not certain whether in that situation he would tell the truth concerning the improper grade, or might find it necessary to furnish false information indicating that Vaughn actually attended the class, thus leaving the Committee on Infractions in the position of attempting to determine what information was accurate.

Throughout consideration of this matter by the Committee, it has been the position of the University and Munford (as well as his legal counsel) that Munford did not report the information set forth in this finding to the NCAA. Munford also has denied to the University that he provided an improper grade to Vaughn as described. After careful consideration of this conflicting information, the Committee believes Munford did, in fact, provide this information to the NCAA and is now attempting to remove himself from involvement in this case. For additional information in this regard, the Committee again directs the Council's attention to Part IV-C of this report.

I. Violation of the provisions governing recruiting [NCAA Bylaws 1-1-(a) and 1-3].

*1. For an approximate one-month period during the University's "mini semester" conducted between terms in the 1973-74 academic year, prospective student-athlete David Vaughn was permitted to participate on various occasions in the University's organized basketball squad practice sessions although Vaughn had not been officially accepted for admission to the institution.

Both the University and the NCAA agree that prospective student-athlete David Vaughn participated in organized basketball squad practice sessions during the University's one-month "mini semester" conducted between terms in the 1973-74 academic year. The basis for the Committee's finding is that a "mini semester" is not considered to be a regular term for purposes of applying NCAA legislation and, therefore, Vaughn was a prospective student-athlete (rather than a regularly enrolled student-athlete) at the time of his participation in the practice sessions; further, Vaughn was never officially accepted for admission as a regular student to the University as required by NCAA Bylaw 1-3-O.I. 110, in order to participate in organized practice sessions. Therefore, Vaughn should not have been permitted to participate in the University's organized bas-

ketball practice sessions between regular terms of the University's academic year.

In past infractions cases, both the Council and the Committee have found that the improper participation of prospective student-athletes in athletic tests or practice sessions constitutes a violation of NCAA Bylaw 1-1-(a) [improper inducements] and Bylaw 1-3 (tryouts), inasmuch as such participation may encourage a prospective student-athlete, to enroll in the institution, as well as violate the tryout rule. Examples of past cases involving such findings are California State University, Long Beach; North Carolina State University, and the University of Minnesota.

J. Violation of the provisions governing recruiting [NCAA Bylaws 1-1-(a), 1-5-(a) and 1-5-(c)].

1. Through the arrangements of then head basketball coach John Bayer, prospective student-athletes James Baker, Philadelphia, Pennsylvania; Dan Cunningham, Salinas, California; Eddie Taylor, Philadelphia, Pennsylvania, and Don Weimer, Chula Vista, California, were provided two paid visits to the University's campus at the expense of the University. Specifically, Bayer arranged for each young man to be provided an initial visit at the University's expense during the 1970-71 academic year, and arranged for the young men to receive round-trip transportation at no cost to them between their homes and Las Vegas in conjunction with a second

visit during the summer following the 1970-71 academic year.

K. Violation of the provisions governing recruiting [NCAA Bylaws 1-1-(a) and 1-5-(b)].

*1. During April 1973, Rodney Parker, a representative of the University's athletic interests, provided $10 cash to Steve Masterson, a friend of prospective student-athlete Rudy Jackson, in order to reimburse Masterson for expenses incurred in transporting Jackson and prospective student-athlete Tico Wynder via automobile from Hutchinson to Wichita, Kansas (approximately 40 miles one way), to meet with Parker.

The University and the NCAA agree that the transaction described in this finding occurred, and that the transaction occurred the day before Parker accompanied Jackson to Las Vegas for the young man's official paid visit to the University's campus. However, it is the University's position that Parker should not be considered a representative of the institution's athletic interests.

The Committee believes Rodney Parker is a representative of the University's athletic interests for the following reasons: (a) Parker initially reported to the NCAA on May 15, 1974, that Jerry Tarkanian had requested that Parker assist the University of Nevada, Las Vegas, in recruiting Rudy Jackson; further, that Tarkanian's request was

made during a conversation at a high school all-star game prior to the time Parker became involved in the transaction set forth in this finding; (b) Parker initially reported to the NCAA that Brad Welch, a representative of the University's athletic interests, arranged for Parker to accompany Rudy Jackson at the time the young man made his official paid visit to the University of Nevada, Las Vegas; (c) prospective student-athletes Tico Wynder and Rudy Jackson have reported to the NCAA that Parker telephoned Jackson to make the arrangements for the young man's official paid visit to the University, and (d) based upon the information developed by the NCAA staff in this case, as well as information developed concerning Jackson's recruitment in a previous infractions case involving another NCAA member institution, it appears that Parker was not involved in Jackson's recruitment by any other collegiate institution.

The Committee has considered information reported by Rodney Parker to the University indicating that Parker merely attempts to assist various prospective student-athletes during the course of their recruitment and should not be considered as a representative of any one institution's athletic interests in terms of Jackson's, or any other prospective student-athlete's, recruitment. In this regard, the Committee believes the Council should note that regardless of the purpose

Parker envisions for his involvement in a prospective student-athlete's recruitment, the fact remains that under NCAA legislation if a member institution's staff member requests or has knowledge of Parker's assistance in the recruitment of a prospect for that institution, then Parker must be considered a representative of that institution's athletic interests.

The Committee also notes that Parker now takes the position that his involvement in the University's recruitment of Jackson occurred on his (Parker's) own initiative, and that he has never reported information to the NCAA indicating that Tarkanian and Welch requested his assistance. After considering this information, it is the Committee's belief that Parker has reported false information to the University in an attempt to remove himself from involvement in this case and has disclaimed the information he originally provided the NCAA accordingly. For additional information related to the Committee's position in this regard, the Council's attention is again directed to Parts IV-C and IV-E of this report.

L. Violation of the provisions governing recruiting [NCAA Bylaws 1-1-(a) and 1-5-(e)].

1. In April 1971, then head basketball coach John Bayer arranged for John Presley, the father of prospective student-athlete Maurice Presley, Houston, Texas, to be provided

round-trip transportation at no cost to him between Houston and Las Vegas, Nevada, in conjunction with his son's official paid visit to the University's campus.

M. Violation of the provisions governing recruiting [NCAA Bylaws 1-1-(a), 1-5-(e), 1-5-(e)-(3), 1-5-(f) and 1-5-(i)].

*1. During April 1973, head basketball coach Jerry Tarkanian and Brad Welch, a representative of the University's athletic interests, arranged for Rodney Parker, another representative of the University's athletic interests, to accompany prospective student-athletes Rudy Jackson and Tico Wynder on their official paid visits to the University's campus at no expense to Parker. Specifically, through the arrangements of Tarkanian and/or Welch, Parker accompanied the young men on a commercial airline flight from Wichita, Kansas, to Las Vegas; further, Tarkanian and/or Welch arranged for Parker to be provided lodging at the Dunes Hotel, and meals and entertainment in Las Vegas during the official paid visits of the young men at no expense to Parker; further, for approximately two days after the prospects returned home, Parker was permitted to remain in Las Vegas while continuing to receive lodging, meals and entertainment at no expense to him; finally, Welch gave Parker approximately $300 cash in order to reimburse Parker for his travel expenses to Las

Vegas from Wichita, and to pay the cost of one-way commercial airline transportation between Las Vegas and New York.

The University and the NCAA are in agreement that Rodney Parker accompanied prospective student-athletes Rudy Jackson and Tico Wynder on their official paid visits to the University's campus; further, that Parker was provided lodging at the Dunes Hotel, meals and entertainment in Las Vegas at no personal expense; finally, that for approximately two days after the prospects in question returned home, Parker remained in Las Vegas while continuing to receiving lodging, meals and entertainment at no personal expense. However, the University denies that Parker received approximately $300 cash from Brad Welch as reimbursement for his travel expenses on this occasion, that Welch or Jerry Tarkanian were involved in any of the arrangements for the lodging, meals and entertainment provided Parker on this occasion, or that Parker is a representative of the University's athletic interests.

The Committee's finding is based on information reported to the NCAA by Parker, who described the arrangements for his transportation, lodging, meals and entertainment on this occasion as set forth in the statement of the finding. The Committee believes the Council should note that Parker specifically

identified Welch as the individual who made these arrangements; further, Parker indicated that Jerry Tarkanian had previously requested his (Parker's) assistance in the recruitment of one of the prospective student-athletes Parker accompanied on this visit. In addition, Parker initially reported to the NCAA that he was provided approximately $300 cash by Welch as reimbursement for his personal expenses.

The Committee has considered the information reported by Parker to the University indicating that an individual with no relationship to the institution's athletic interests made the arrangements for the lodging, meals and entertainment in question; further, that Parker paid for his own transportation expenses. It is the Committee's belief that Parker has altered the information he initially provided the NCAA, and which he now claims he never provided the NCAA, in order to remove himself from involvement in this case. For additional information in this regard, the Committee again directs the Council's attention to Parts IV-C and IV-E of this report. Finally, the Committee believes that Parker should be considered a representative of the University's athletic interests for the reasons set forth as the basis for its finding in Part I-K-1 of this report.

N. Violation of the provisions governing recruiting [NCAA Bylaws 1-1-(a) and 1-5-(f)].

*1. Beginning in the 1970-71 academic year and continuing until the present time, prospective student-athletes making their official visits to the University's campus have been lodged in local, luxury hotels in Las Vegas which provide facilities which are not on a scale comparable to that of normal student life on campus, in that minimum regular rates of approximately $30 per day are charged; further, prior to the fall, 1973-74 academic year, prospective student-athletes were escorted to or permitted to attend dinner shows and other live entertainment at these and similar luxury hotels at no cost to them, resulting in the payment or provision of excessive entertainment for these young men, in that normal admission prices of approximately $22 per person for a dinner show and approximately $15 per person for a late-night show were charged at these hotels.

It is the Committee's position that the Las Vegas luxury hotels located primarily on the Las Vegas "strip" provide facilities which are not on a scale comparable to that of the normal student life on the University's campus as required by NCAA Bylaw 1-5-(f). The University has submitted information indicating that it utilizes the facilities of these hotels because they are near the University's campus and offer rates comparable to chain

motels such as Holiday Inn, Howard Johnson's and Travel Lodge.

Although the University has reported information indicating that it is able to secure lodging for prospective student-athletes at luxury hotels for costs comparable to the rates charged at chain motels, the Committee notes that the critical factor in terms of compliance with NCAA regulations governing the lodging of prospective student-athletes is not the cost charged the University, but whether the facilities available at these luxury hotels are comparable to facilities available on campus. In this regard, the Committee also notes that luxury hotels could provide lodging and entertainment for a prospective student-athlete at no charge to a member institution, and the provision of such lodging and entertainment would still be contrary to NCAA recruiting regulations, inasmuch as these regulations relate to benefits provided the prospective student-athlete, rather than the cost of such benefits to the institution. Similar findings have been made on this basis in previous infractions cases, including West Texas State University and the University of Minnesota.

It should be noted that beginning in the fall of the 1973-74 academic year, the University has limited the entertainment of prospective student-athletes housed at these luxury hotels. However, prior to the fall of the 1973-74 academic year, prospective student-athletes were entertained at dinner shows and performances at these luxury hotels at no personal expense resulting, in the Committee's opinion, in excessive entertainment for these prospects under the requirements of Bylaw 1-5-(f). The Committee believes the fact that the University, on its own initiative, curtailed such entertainment of prospective student-athletes at these hotels is supportive of the Committee's position.

*2. In April 1973, during the official paid visit of prospective student-athlete Eddie Owens, Houston, Texas, then assistant basketball coach Tony Morocco provided an automobile to the young man for his personal use for an evening at no cost to Owens.

The Committee's finding is based upon information reported to the NCAA by Eddie Owens on May 29, 1973. It should be noted that this interview was conducted prior to Owens' initial enrollment in the University, approximately two months after the incident in question. The University has submitted information obtained from Owens in May 1976 indicating that the information he originally provided the NCAA is incorrect. Further, the University is unable to identify the owner of an automobile similar to the one originally described by Owens.

It is the Committee's position that Owens did report accurate information during his

initial interview with the NCAA, inasmuch as he described in detail the arrangements by Morocco to provide him the use of an automobile shortly after the incident occured; further, the Committee believes that at the time of this original interview, Owens had no reason to provide false information to the NCAA. The Committee does not believe it would be necessary to identify the owner of this automobile in order to establish that a violation occurred in this instance. The fact that assistant basketball coach Tony Morocco made this automobile available to Owens, regardless of the identity of the automobile's owner, is clearly contrary to the provisions of Bylaws 1-1-(a) and 1-5-(f).

The University has submitted nformation indicating that it does not believe that this finding constitutes a violation of NCAA Bylaw 1-1-(a) [improper inducement]. In this regard, the Committee notes that the offer or provision of any financial aid or equivalent inducement (e.g., the use of an automobile) not otherwise permitted by NCAA legislation in the recruitment of prospective student-athletes has been considered by both the Committee and Council in past infractions cases to constitute an improper inducement. Examples of the application of this legislation to similar situations can be found by the Council in numerous past infractions cases involving violations of NCAA recruiting regulations.

*3. During April 1973, while recruiting prospective student-athletes Rudy Jackson and Tico Wynder, Hutchinson, Kansas, Rodney Parker, a representative of the University's athletic interests, paid the expenses for one night's lodging and a meal for the young men at the Diamond Inn Motel in Wichita, Kansas.

The University and the NCAA agree that the facts set forth in this finding occurred as described, and that these events occurred the day before Rodney Parker accompanied Jackson and Wynder to Las Vegas for the young men's official paid visits to the University's campus. However, as previously noted, it is the University's position that Parker should not be considered a representative of the institution's athletic interests.

In this regard, the Committee directs the Council's attention to the information set forth in Part I-K-1 of this report as it relates to the description of Parker's relationship to the University's athletic interests in this case. For additional information concerning the Committee's position in regard to information provided the University by Parker, the Council's attention is again directed to Parts IV-C and IV-G of this report.

O. Violations of the provisions governing recruiting [NCAA Bylaws 1-1-(a) and 1-6(a)].

1. In April 1971, in an effort to encourage the enrollment of prospective student-athlete Dan Cunningham, then head basketball coach John Bayer promised the young man and his parents that Cunningham would receive a full athletic grant-in-aid at the University for a period of five years.

*2. Prior to the beginning of classes for the 1973-74 academic year, head basketball coach Jerry Tarkanian arranged for prospective student-athlete Robert "Jeep" Kelley to be provided the benefit of one-way commercial airline transportation at no expense to Kelley to travel between his home in Pittsburgh, Pennsylvania, and Las Vegas, Nevada, for the purpose of enrolling in and attending classes at the University during that academic year; further, upon arriving in Las Vegas during the summer, Tarkanian arranged for Kelley to be lodged for approximately one month, at no expense to Kelley, with student-athlete Ricky Sobers at the Sierra Vista Apartments in Las Vegas, Nevada.

The Committee's finding is based upon information reported to the NCAA by Robert Kelley on May 15, 1975. Kelley stated that he received the benefits as described through

the arrangements of Tarkanian as found by the Committee.

The University's appeal is based primarily on information developed during its interviews with Kelley. As previously noted, the Committee believes that after Kelley provided information to the NCAA related to this and other findings, he was improperly encouraged and pressured to provide the University false information. In this regard, the Committee again directs the Council's attention to Parts I-F-1, IV-C and IV-E of this report.

3. During the 1973-74 academic year, assistant basketball coach Tony Morocco arranged for his nephew, Tom Morocco, to pay (with cash provided by Tony Morocco) the cost to rent a U-Haul trailer utilized to move the household goods of prospective student-athlete David Vaughn from his home in Tulsa, Oklahoma, to Las Vegas, Nevada (approximately 1000 miles), as well as the costs incurred by Morocco and Vaughn for gasoline, room and board during the trip.

4. During the 1973-74 academic year, assistant basketball coach Tony Morocco arranged for Bill Dougherty (who was residing in the Morocco home in Las Vegas at the time) to transport prospective student-athlete David Vaughn, Tulsa, Oklahoma, in Vaughn's automobile from Flagstaff, Arizona, to Las Vegas (approximately 150 miles) at no cost to Vaughn.

P. Questionable practice in light of NCAA requirements [NCAA Bylaw 4-6-(d)].

1. At a time when certain practices of the University's intercollegiate basketball program were not in compliance with NCAA legislation, the chief executive officer of the University, Donald H. Baepler, based upon information provided by athletic department staff members and without intent to do so, erroneously certified on May 21, 1974, the University's compliance with NCAA legislation.

Q. Violation of the provisions governing certification of compliance with NCAA legislation [NCAA Bylaw 4-6-(d)].

*1. With full knowledge at the time that certain practices of the University's intercollegiate basketball program were not in compliance with NCAA legislation, head basketball coach Jerry Tarkanian failed to report to University officials during an institutional review conducted in conjunction with the University's May 21, 1974, certification of compliance with NCAA legislation, his knowledge of and involvement in any violations of NCAA legislation.

The Committee's findings set forth in Parts I-A-2, I-A-3, I-C-6, I-H-7, I-M-1 and I-O-2 of this report relate to Jerry Tarkanian's involvement in events which occurred prior to the University's May 21, 1974, certification

of compliance with NCAA legislation. If any of these findings are upheld by the Council, the Committee believes this finding (I-Q-1) to be supported without need for further explanation or justification, other than to note that Tarkanian failed to report his knowledge of or involvement in the violation(s) upheld by the Council.

R. Questionable practice in light of NCAA requirements [NCAA Bylaws 4-6-(d) and 4-6-(d)-(4)].

*1. At a time when certain practices of the University's intercollegiate basketball program were not in compliance with NCAA legislation, head basketball coach Jerry Tarkanian attested to the chief executive officer of the University on a statement filed in conjunction with the University's June 25, 1975, certification of compliance with NCAA regulations, that he had reported his knowledge of and involvement in any violations of NCAA legislation involving the institution.

It should be noted that the Committee did not find a violation in regard to this certification. However, if the Council upholds any of the Committee's findings set forth in Parts I-A-3, I-A-5, I-C-5 and I-C-8 of this report, it is the Committee's position that head basketball coach Jerry Tarkanian was in a position to know, if in fact he did not know, that these violations had occurred and should have been reported at the time he signed

the staff certification statement associated with the University's June 25, 1975, certification of compliance with NCAA legislation.

II. Penalty to be imposed upon institution, as proposed by Committee.

[NOTE: Each penalty appealed by the University of Nevada, Las Vegas, is identified by an asterisk (*). The primary reasons for the Committee on Infractions' proposed penalties are set forth at the conclusion of this section and are separated by a line.]

*A. The University of Nevada, Las Vegas, shall be publicly reprimanded and censured, and placed on probation for a period of two years from the date this penalty is imposed, which shall be the date established by NCAA Council action as a result of an appeal by the University to the Council, it being understood that should any of the penalties in this case be set aside for any reason other than by appropriate action of the Association, the penalty shall be reconsidered by the NCAA; further, prior to the expiration of this period of probation, the NCAA shall review the athletic policies and practices of the University.

*B. During the probationary period, the University's intercollegiate basketball team shall end its seasons with the playing of its last, regularly scheduled inseason contest and the University shall not be eligible to participate in the National Collegiate Basketball Championship or any other postseason basketball competition.

*C. During the probationary period, the University's intercollegiate basketball team shall not be eligible to appear on any television series or program subject to the administration or control of this Association, and the institution shall not make any commitments for such appearances prior to the University being restored to full rights and privileges of NCAA membership.

*D. During the 1978-79 academic year, no more than three student-athletes in the sport of basketball shall receive initial, athletically related financial aid (as set forth in O.I. 500) which has been arranged for or awarded by the University of Nevada, Las Vegas, regardless of the time such aid becomes countable under the requirements of NCAA Bylaw 5.

*E. During the 1979-80 academic year, no more than three student-athletes in the sport of basketball shall receive initial, athletically related financial aid (as set forth in O.I. 500) which has been arranged for or awarded by the University of Nevada, Las Vegas, regardless of the time such aid becomes countable under the requirements of NCAA Bylaw 5.

[NOTE: In the event no more than three student-athletes in the sport of basketball are permitted to receive initial, athletically related financial aid (as set forth in O.I. 500) during the 1977-78 academic year, regardless of the time such aid is countable under the requirements of NCAA Bylaw 5, this is notification that the penalties set forth in Parts II-D and E above shall be applied to the 1977-78 and 1978-79 academic years respectively.]

F. The Committee on Infractions requests the University of Nevada, Las Vegas, to show cause, in accordance with Section 7-(a)-(12)-(i) of the Official Procedure Governing the NCAA Enforcement Program, pages 119-120, 1976-77 NCAA MANUAL, why additional penalties should not be imposed upon the University if it does not take appropriate disciplinary and corrective action with regard to:

1. Former assistant basketball coach Fred Albrecht which, in the Committee's present view, should be complete severance of any and all relations Albrecht may have, formally or informally, with the University's intercollegiate basketball program during the probationary period including, but not limited to, his financial support, recruiting efforts and membership in institutional basketball booster groups.

2. Former head basketball coach John Bayer which, in the Committee's present view, should be complete and permanent severance of any and all relations Bayer may have, formally or informally, with the University's intercollegiate athletic program including, but not limited to, his financial support, recruiting efforts and membership in institutional athletic booster groups.

3. Ann Cohen, Burrell Cohen, Richard Davis, Frank Denton, Howard Kincaid, Sam Krug, Harvey Munford, Rodney Parker, Art Thomas and Brad Welch, representatives of the University's athletic interests, which, in the Committee's present view, should be complete and permanent severance of any and all relations these individuals may have, formally or informally, with the University's intercollegiate athletic program including, but not limited to, their financial support, recruiting efforts and membership in institutional athletic booster groups.

[NOTE: The names of Sam Krug and Art Thomas should be deleted from this show cause requirement inasmuch as the Committee has withdrawn its finding (Part I-C-3 of this report) involving these individuals.]

4. Head basketball coach Jerry Tarkanian which, in the Committee's present view, should be complete severance of any and all relations Tarkanian may have, formally or informally, with the University's intercollegiate athletic program during the period of the University's probation including, but not limited to, activities associated with administration, supervision, coaching, recruiting, athletic booster groups and public relations or fund-raising activities related to the University's athletic program.

[NOTE: Your attention is directed to Section 7-(a)-(12) of the Official Procedure Governing the NCAA Enforcement Program, page 120, 1976-77 NCAA MANUAL. Inasmuch as the University has appealed the findings of violations set forth in this report involving each of the individuals identified

in Parts II-F-1 through 4 of the proposed penalty in this case, the Committee on Infractions' show cause requirement described in Part II-F will not be in effect in regard to the individuals identified in the appropriate findings, until the NCAA Council has acted upon the University's appeal. If the Council arrives at a conclusion in regard to an appealed finding which substantially sustains the Committee on Infractions' finding of violation involving the individual in question, the 15-day period of the show cause requirement set forth in Section 7-(a)-(12) shall begin with the date of receipt by the University of written notification of the Council's action. If the Council substantially alters the Committee's finding of violation involving the individual, the Committee will reconsider the show cause requirement involving the individual and the University will be notified of the Committee's conclusion.

The University's attention is directed to page 120 of the 1976-77 NCAA MANUAL where the show cause procedures are clearly described, including the responsibility of the institution to provide due notice and hearing to the involved individual before taking any disciplinary or corrective action. Also, information set forth on page 120 describes the responsibilities of the institution in regard to written notification to the NCAA within the appropriate 15-day period applicable to the show cause requirement. Also, note that the determination of whether the actions taken by the University are appropriate with regard to this show cause requirement shall be solely that of the Committee on Infractions.]

[NOTE: When such penalties and corrective actions as are determined by the Council become effective, the University should take every precaution to insure that the terms of the penalties and corrective actions are observed. Further, the Committee on Infractions intends to monitor the penalties and corrective actions during their effective periods, and any action contrary to their terms shall be considered grounds for extending their provisions and the University's probationary period.]

The University has appealed the penalties identified in this report, based primarily on the contention that for the most part the serious violations in this case did not occur; further, the University has cited additional reasons set forth in President Baepler's May 13, 1977 letter appealing the proposed penalties. If the Council upholds for the most part the appealed findings, the Committee believes the proposed penalties are fully justified. However, the Committee also submits the following paragraphs which include several of the primary factors considered in arriving at the penalties and serve to respond to the specific reasons cited by the University for its appeal.

1. It should be noted that the findings of the Committee in this case include violations of various sections of the NCAA Constitution and Bylaws related to improper aid and extra benefits to prospective and enrolled student-athletes, institutional control and responsibility, ethical conduct, recruiting, institutional eligibility for championship events, certification of compliance with NCAA legislation, and the cooperative principle

of the NCAA enforcement program. Specifically, the Committee found violations of NCAA Constitution 3-1-(g)-(5), 3-1-(g)-(6), 3-2, 3-4-(a), 3-6-(a) and 3-9-(e), and Bylaws 1-1-(a), 1-3, 1-5-(a), 1-5-(b), 1-5-(c), 1-5-(e), 1-5-(e)-(3), 1-5-(f), 1-5-(i), 1-6-(a), 4-6-(b), 4-6-(d) and 7-5-(d), and the opening statement of the Official Procedure Governing the NCAA Enforcement Program. In addition, the Committee found questionable practices related to the University's certification of compliance with NCAA legislation under the provisions of Bylaws 4-6-(d) and 4-6-(d)-(4). In the event the Council upholds for the most part the Committee's findings, it should be noted the Committee believes these numerous, varied and serious violations were not the result of inadvertent actions or ignorance of NCAA rules; rather, the Committee believes this case demonstrates a disregard for the governing legislation on the part of certain University staff members and athletic representatives, and, therefore, the proposed penalties in this case are fully justified.

2. The University has appealed the proposed penalties in this case in part on the basis that the University has not been involved in a previous infractions case. It should be noted that in determining the proposed penalties in any infractions case, the Committee considers the institution's previous record of involvement in such cases. Specifically, the provisions of Section 7-(a) of the Official Procedure Governing the NCAA Enforcement Program state in part that

"previous violations of NCAA legislation shall be a contrib[illegible]g factor in determining the degree of penalty."

Accordingly, had the University been involved in a previous infractions case, the proposed penalties in this case would have been substantially more severe. On the other hand, the Committee believes the University's past record would not be reason to further or completely relieve the institution of its responsibility for the violations found by the Committee in this case.

3. The University has appealed the Committee's proposed penalties based in part upon disciplinary and corrective actions already taken by the University. Based upon information presented by the University to date, the Committee is not aware of any disciplinary action which has been taken by the University as a result of violations in this case. In regard to corrective actions cited by the University, the institution contends that its decision to dismiss former head basketball coach John Bayer in the spring 1973 was based upon his "care-free attitude about possible NCAA penalties being imposed against the institution." In this regard, it should be noted that this action concerning Bayer was not based on any findings by the University that he actually was involved in violations of NCAA legislation.

Based upon its findings in this case, the Committee does not believe the University's selection of head basketball coach Jerry Tarkanian as Bayer's replacement represents a meaningful solution to

the concerns expressed by the institution in the spring 1973. In the event the Council accepts the Committee's finding as set forth in Part I-M-1 of this report, it should be noted that Tarkanian was involved in a violation of NCAA legislation approximately two weeks after the date he began employment with the University. Further, Brad Welch, a representative of the University's athletic interests who has been identified as a principal spokesman for the institution in encouraging Tarkanian to accept employment with the University, is also identified in the finding set forth in Part I-M-1 of this report. Additional findings by the Committee involving Tarkanian are set forth in Parts I-A-2, I-A-3, I-C-6, I-E-1, I-F-1, I-H-7, I-O-2, I-Q-1 and I-R-1 of this report.

It should also be noted that at the time Tarkanian was hired, he was a principal in an infractions case under consideration by the Committee involving California State University, Long Beach. Although the processing of this case was confidential under NCAA requirements, no information has been presented to the Committee to indicate that the University of Nevada, Las Vegas, contacted officials of California State University, Long Beach, to obtain any information related to Tarkanian's past performance at the time the decision was made to employ him as Bayer's replacement.

In summary, based upon all available information, the Committee does not accept the University's contention that Tarkanian was, in fact, more willing to abide by NCAA legislation than his predecessor. To the contrary, the Committee believes the University's assertion of its good intions in replacing Bayer with Tarkanian is not supported by the information in this case. Accordingly, the Committee does not believe the University's action in this instance warrants consideration as a mitigating factor in this case.

The University also contends that various personnel changes involving the former president of the University and the former director of athletics, as well as a general reorganization of the athletic department, should be considered as mitigating factors. The Committee does not believe that this information is significant in consideration of a penalty in this case, inasmuch as no information has been submitted to support a conclusion that these actions resulted from findings of actual violations of NCAA regulations. Rather, the available information indicates the actions in question were based upon a general lack of interest in the control of the University's athletic program on the part of the individuals who were replaced.

4. The University has appealed the Committee's proposed penalties based in part upon the lengthy investigation of this case by the NCAA enforcement staff, as well as the consequences of publicity surrounding the investigation. The Committee does not believe either the length of the investigation by the NCAA or the publicity re-

lated to this case has had any appreciable effect upon the University's athletic program. In this regard, the won/loss records of the University's intercollegiate basketball team for the past five years are: 1972-73, 14-14; 1973-74, 20-6; 1974-75, 24-5; 1975-76, 29-2, and 1976-77, 29-3; further, the University has participated in the National Collegiate Basketball Championships during the 1974-75, 1975-76 and 1976-77 academic years and finished as the third-place team in the 1976-77 National Collegiate Basketball Championship; further, the University has reported that based in part on the success of its intercollegiate basketball team during this period, financial contributions by supporters of the University have subtantially increased.

5. The University has appealed the Committee's proposed penalties in this case based in part upon the time differential between the dates the violations occurred as found by the Committee and the date the proposed penalties would be imposed. In this regard, it should be noted that the violations of NCAA legislation found by the Committee in this case occurred during a period beginning in April 1971 and ending with the conclusion of the 1974-75 academic year. Among the reasons for the resultant time differential are: (a) the NCAA's investigation of this case was not sufficiently complete to draft an initial official inquiry to be submitted to the University until January 1976; (b) subsequent to receipt of the official inquiry in February 1976 and a supplement in June 1976, the University found it

necessary to request two delays in forwarding its response to the Committee in order to complete its review of each allegation, and the University's response was not received until October 29, 1976; (c) although the University initially appeared before the Committee on November 14, 1976, due to the length of time expended in discussing the various allegations, the Committee and the University found it necessary to meet again on December 13 and 14, 1976, as well as on March 13, 1977, in order to conclude the Committee's hearing of this case, and (d) subsequent to receipt of the Committee's April 26, 1977, confidential report, the University initiated this appeal resulting in the NCAA Council's consideration of this case on August 22, 1977. Obviously, the period of time necessary for the University to conduct its review of these allegations, appear before the Committee on Infractions, and utilize its appeal opportunity before the Council has contributed significantly to the time differential between the violations in this case and penalty imposed.

In regard to Item (a) above, although the NCAA's investigation extended through January 1976, it should be noted that this investigation not only involved information which was included in official inquiries to the University (related to alleged violations occurring throughout the identified period, including the 1974-75 academic year), but also involved information which did not result in the submission of allegations to the University. Subsequent to the completion of this

investigation, a period exceeding one and one-half years (January 1976 - August 1977) has elapsed while the University reviewed the allegations, prepared its response to the official inquiry, and appeared in hearings before the Committee and the Council. Although the Committee is concerned with the length of time necessary to process major infractions cases, it believes that the procedures adopted by the NCAA membership and implemented by the Council and Committee on Infractions are necessary to insure that the interests of the NCAA membership, the involved institution and all involved individuals are adequately protected. Further, in the Committee's judgment the time expended to protect these interests in this case should not be considered by the Council as a basis for reducing the proposed penalties.

6. The University has appealed the Committee's findings in part on the basis of the effect they will have upon students and University personnel unassociated with the infractions. Based upon the violations of the Association's governing legislation which have been found by the Committee in this case, it is apparent to the Committee that certain members of the University's basketball coaching staff, as well as certain representatives of the University's athletic interests, violated NCAA legislation in a manner which reflects a lack of proper institutional control. As the Council is aware, the NCAA is an association of member institutions, and it is a fundamental principle of this Association that the control and

responsibility for the conduct of intercollegiate athletics must be exercised by the institution itself. Further, under the provisions of Section 7-(a) of the Official Procedure Governing the NCAA Enforcement Program, "the NCAA penalty should be broad and severe if the violation or violations reflect a general disregard for the governing rules." The Committee believes the penalties proposed in this case as set forth in Parts II-A through E of this report are consistent with this directive and are designed to insure that the University assumes appropriate institutional responsibility for the conduct of its intercollegiate athletic program.

In addition, noting the Council's position that the penalties in infractions cases should also relate directly to the individuals involved in the violations, the Committee has voted to impose a show cause requirement (as set forth in Part II-F of this report) in accordance with the provisions of Section 7-(a)-(12)-(i) of the Official Procedure Governing the NCAA Enforcement Program. This requirement relates to the University's former head basketball coach, a former assistant basketball coach, the present head basketball coach and various representatives of the University's athletic interests. Considering the nature of the violations in which these individuals are involved (as set forth in Part I of this report), the Committee believes that it is apparent the show cause requirement in each case is fully justified. Accordingly, it is the Committee's position that the sanctions proposed in this case are

appropriate and consistent with the principles and purposes of the Association's enforcement program.

7. The Committee believes this to be a most serious case. In determining a penalty, the Committee has attempted to review the various violations in comparison with those found in other infractions cases considered by the Committee and the Council. While recognizing that no two cases are exactly alike, the Committee concluded after extensive consideration that the proposed penalties in this case are in keeping with the penalties imposed by the Committee and Council in previous infractions cases.

III. Origin of case.

Under date of June 21, 1971, a letter was received by the NCAA executive office alleging the improper recruitment of prospective student-athlete Dan Cunningham (Salinas, California) by representatives of the University of Nevada, Las Vegas. Subsequent to receipt of this information, additional information was received by the NCAA alleging the improper recruitment and improper certification of eligibility of other prospective student-athletes.

Under date of November 28, 1972, the Committee on Infractions submitted a notice of preliminary inquiry to the chief executive officer of the University of Nevada, Las Vegas. During inquiries into these initial allegations, the NCAA continued to receive information alleging additional allegations of the Association's legislation on the part of the University and therefore, proceeded to investigate these charges.

Under date of February 25, 1976, the Committee on Infractions submitted an official inquiry to the chief executive officer of the University of Nevada, Las Vegas, and under date of June 21, 1976, the Committee filed a supplemental official inquiry with the University's chief executive officer.

The University's initial response to the Committee's official inquiry and supplement was received on October 29, 1976. The University submitted an additional response to certain allegations on December 3, 1976, and submitted additional materials for the Committee's consideration on November 14, 1976, and March 4, 1977. The University's representatives appeared before the Committee on November 14 and December 13-14, 1976, and March 13, 1977.

Upon consideration of the Committee on Infractions' Confidential Report No. 123 (47) dated April 26, 1977, the University initiated an appeal to the Council in accordance with Section 5 of the Official Procedure Governing the NCAA Enforcement Program.

IV. Related factors appropriate for consideration in judgment of case.

A. The Council should note that the University's hearing before the Committee on Infractions in this case was conducted over a four-day period (November 14 and December 13-14, 1976, and March 13, 1977), resulting in more than 26 hours of discussion of the allegations in this case. Further, the Committee members spent a considerable number of additional hours both individually

and collectively in reviewing written information submitted by the University, and in considering all information presented in order to determine its findings and the proposed penalties in this case. In this regard, the Committee considered more than 70 separate allegations in this case and eventually made 38 separate findings of violations or questionable practices.

B. The Committee believes it appropriate to note that the University did not develop any information during the course of its investigation of this case resulting in the self-disclosure of any violation of NCAA legislation to the Committee. Accordingly, all of the findings in this case resulted from allegations developed through investigation by the NCAA.

C. The Committee notes that in developing its position concerning the validity of the numerous allegations in this case, the University has relied primarily upon information reported or secured by individuals associated with the athletic interests of the University (e.g., University coaches, enrolled student-athletes, representatives of the University's athletic interests and close associates of these coaches or representatives). The information provided by these individuals to the University is often in direct conflict with information reported to the NCAA investigative staff; further, in some instances the conflicting information is provided by the same individuals (e.g., John Bayer, Rudy Jackson, Robert Kelley, Harvey Munford, Eddie Owens, Rodney Parker and Ricky Sobers).

In weighing the information reported by all sources in an attempt to determine the facts, the Committee noted that the information initially provided the NCAA by those individuals who have reported conflicting information in this case included specific details associated with the violations; further, that these individuals had no reason to provide detailed false information during their initial interviews with the NCAA; finally, that information provided the University by these individuals in subsequent interviews reflected changes which served the athletic interests of the institution. In this regard, it has been the Committee's experience that oftentimes individuals closely associated with the personnel or athletic interests of the institution under inquiry, as well as individuals employed by the institution, are motivated to provide information which would protect the institution's athletic interests. Further, those individuals directly involved in alleged violations oftentimes are motivated to provide information which would protect their own personal interests.

The Committee believes the Council should also note that the University utilized the services of certain principals identified in alleged violations to contact other individuals cited in various allegations in order to make arrangements for these individuals to provide statements ultimately utilized to develop the University's position as set forth in its response to the official inquiry. In addition, the University relied in part upon

statements developed by a principal in this case to make various charges against members of the NCAA investigative staff. Finally, certain individuals reporting information in support of the University's athletic interests in this case were provided commercial airline transportation at no cost to them to travel from out-of-state locations in order to be interviewed in Las Vegas, a location the University described to the Committee as a "neutral site." The Committee notes that it would appear difficult for the University to weigh the objectivity of information obtained as a result of these procedures.

D. In the Committee on Infractions' view, the involvement of head basketball coach Jerry Tarkanian in the finding set forth in Part I-F-1 of this report constitutes a most serious violation of NCAA regulations in that it represents a disregard for the fundamental cooperative principle of the NCAA enforcement program and is contrary to the basic principles of ethical conduct. Further, the Committee believes the findings set forth in Parts I-G-1 and I-H-7 of this report are most serious inasmuch as these violations, which involve the University's former head basketball coach, John Bayer (I-G-1), and the University's present head basketball coach, Jerry Tarkanian (I-H-7), relate to the academic qualifications of student-athletes.

E. The University, in presenting its case to the Committee, has charged that certain members of the NCAA staff did not collect information reported in this case in an objective and impartial manner, and in some instances may have knowingly misrepresented and falsified information presented to the Committee for its consideration during the hearings in which the University participated.

The Committee believes it has provided the University every opportunity to present information and evidence to support its contentions. The University submitted materials to the Committee related to these charges at the time of its first hearing on November 14, 1976, and submitted additional related materials to the Committee under dates of December 3, 1976, and March 4, 1977. Further, these charges were reviewed during the University's appearances before the Committee when information related to the allegations in this case was presented by representatives of the University and the NCAA staff for consideration by the Committee.

Thereafter, in light of the seriousness of these charges, the Committee authorized a special hearing on March 13, 1977, for the purpose of permitting the University, its head basketball coach, Jerry Tarkanian, and his personal legal counsel to question enforcement representatives and review specific charges concerning information reported in this case by Robert Kelley and Rodney Parker. Although the Committee was provided written background material concerning the charges in question, neither the principal investigator in this case nor any other NCAA staff member was provided this material prior to or during this hearing.

After careful consideration of all information presented by the University, Jerry Tarkanian, his personal legal counsel and the NCAA staff in this case, it is the Committee's conclusion that the University's charges in regard to the NCAA enforcement staff, including the principal investigator in this case, are without substance. In this regard, it is the Committee's position that information related to these charges was developed under questionable circumstances, primarily from individuals motivated to provide information to protect the interests of Tarkanian and the University.

Further, it is the Committee's opinion that the NCAA enforcement staff has investigated this case in accordance with the high standards of personal integrity required in the processing of all infractions cases presented to the Committee. Therefore, the Committee is concerned that the attacks against the enforcement staff in this case have been designed in part to direct the Committee's attention away from the facts related to the alleged violations involving the University. The Committee believes the University's reliance upon this type of approach has actually hindered the development of factual information by the University in its review of alleged violations in this case.

In this regard, the Committee does not believe that the University, in all instances, investigated the numerous allegations submitted in this case with a commitment to determine whether each allegation was substantially cor-

rect. Rather, it is the Committee's opinion that in considering these allegations, particularly those related to head basketball coach Jerry Tarkanian, the University chose to direct its efforts toward developing a defense by attacking the credibility of individuals reporting information contrary to its interests and attempting to impugn the integrity and procedures of the NCAA investigative staff, rather than directing a similar effort toward attempting to determine whether the alleged violations had actually occurred.

F. At various times during the processing of this case, the University has challenged and questioned the Association's procedures. The Committee's responses to these challenges and questions, in regard to the procedures, are set forth for the most part in letters to the University's president, its chancellor and its legal counsel (the chief deputy attorney general, Nevada) dated November 28, 1972; March 14, 1974; April 23, 1974; January 19, 1976; February 25, 1976; May 21, 1976; June 2, 1976; June 8, 1976; June 21, 1976; June 24, 1976; September 14, 1976; November 5, 1976; December 4, 1976; April 26, 1977; May 27, 1977, and July 29, 1977. It is the Committee's opinion that these letters accurately describe procedures that were followed in this case, and the basis therefore in regard to each procedure challenged or questioned by the University. Rather than summarize the contents of this correspondence, the Committee calls to the Council's attention that this infor-

mation is a matter of record for the Council's consideration.

G. As the Council is aware, the Official Procedure Governing the NCAA Enforcement Program (as set forth in the NCAA MANUAL) is established by the Council, approved and adopted by the NCAA membership, and implemented by the Committee on Infractions in accordance with the authority vested in the Committee under the Association's Constitution, Bylaws and the Official Procedure itself. During the processing of infractions cases, the Committee acts under this authority to implement the Official Procedure and respond as necessary to questions which arise concerning the guidelines, policies and procedures of the Committee in situations not specifically described under the Official Procedure. Responses to questions concerning the applicable guidelines, policies and procedures to be followed in such situations are provided by the Committee on Infractions to each member institution involved in an infractions case, including the University of Nevada, Las Vegas.

Specifically, the University of Nevada, Las Vegas, has been notified that the general procedures to be followed in an infractions case are contained in the Official Procedure set forth in the NCAA MANUAL, and in each instance in which the University has requested additional information concerning Committee guidelines related to particular situations in this case, the University has been fully informed of applicable operating policies and procedures (reference:

Part IV-F of this report). Nonetheless, the University has also requested a statement of all Committee on Infractions guidelines, policies and procedures (developed in response to specific situations arising in the processing of current and past infractions cases) which were in effect at any time during the processing of this case. Upon receipt of the University's request for this additional information, the Committee informed the institution that the various decisions made by the Committee in reference to situations involving different infractions cases were recorded in Committee minutes related to those cases and in some instances were included in the confidential records describing the specific details of those cases. Further, the Committee noted that the guidelines, policies and procedures developed in response to situations in past cases were subject to continual review, and any compilation of such information would not affect the University's position in this case inasmuch as the Committee would continue to respond to any questions posed by the Universtiy concerning policies and procedures applicable to situations arising in this case. In this regard, the Council's attention is again directed to Part IV-F of this report.

In addition, as the Council is aware, the Committee on Infractions is in the process of compiling previously recorded Committee policies and procedures on file, as well as drafting additional proposed policies and procedures for the review and approval of the Committee and

the Council. Subsequent to the review of the Committee and the Council, this statement will be made available to the NCAA membership in general.

Accordingly, the Committee has informed the University that once the compilation of this material (presently under way at the direction of the Council) is completed and approved by the Committee and the Council, a copy of the compilation will be forwarded to the University of Nevada, Las Vegas. However, the Committee has denied the University's request for an additional statement of the Committee's past policies, inasmuch as it would be necessary for the Committee to edit past Committee minutes, deleting all references to other member institutions and preparing a statement of these decisions in the context of the various circumstances affecting each particular case, a task the Committee believes is unnecessary to undertake merely for the informational purposes of one institution, particularly in light of other factors related to the University's request.

In this regard, the Committee on Infractions asks the Council to note the following significant factors relevant to the University's request for this additional information: (1) this infractions case has been processed in the same manner as any other infractions case, fully in accordance with the Official Procedure Governing the NCAA Enforcement Program and the Committee on Infractions' policies and procedures; (2) in the

Committee's opinion, the University has been fully advised of all applicable policies and procedures throughout the processing of this case; (3) all specific questions and procedural challenges posed by the University in regard to Committee on Infractions policies and procedures have been answered by the Committee, which remains prepared to answer any additional questions, and (4) the Committee on Infractions and the Council are in the process of reviewing a codification of current Committee on Infractions policies and procedures in order to compile a statement which will be made available to the NCAA membership in general.

Finally, it should be noted that the distribution of the Committee's operating policies and procedures to the NCAA membership in general will not eliminate the need for future notification of procedural changes to institutions involved in infractions cases, nor will it eliminate the need for institutions to contact the Committee to request answers to new procedural questions which may arise in a particular infractions case. Obviously, new procedural questions will arise which will require consideration by the Committee on a case-by-case basis. Accordingly, it will be necessary for the Committee to continue to advise involved member institutions of applicable policies and procedures in their particular cases, as the Committee has done throughout the processing of this case involving the University of Nevada, Las Vegas.

V. Disciplinary or corrective actions taken by institution or conference, or any other agency involved in particular incident.

A. The Committee is not aware of any disciplinary action taken in this case by the University or any other agency.

B. The University has reported that prior to June 1973, the University reorganized its department of athletics and replaced its president, director of athletics and basketball coaching staff. In this regard, the Council's attention is directed to Item 3 on page 32 of this report.

University of Nevada, Reno
Desert Research Institute

University of Nevada, Las Vegas
Community College Division

NON-TENURED PROFESSIONAL EMPLOYMENT DOCUMENT

Date April 16, 1973

Name Mr. Jerry Tarkanian

Address and Zip Code 4151 Calhoun Drive, Huntington Beach, California

Check one: New Appointment X Continuing Appointment ___ Previous years credited to tenure ___

For new appointments only:

Social Security No. 282-26-8807 Birthdate August 8, 1930 Sex M Highest Degree Earned M.A.

APPOINTMENT

College and Department	Athletics Department		
Title	Head Basketball Coach Professor of Physical Education	Rank	Step
Term of Contract	From July 1, 1973 To June 30, 1974		
Type of Appointment	A 12 Months X	B Academic Year ___	C Temporary ___ Explain in remarks
Contract Salary	$ 22,000	Monthly Installment Rate $ 1,833.33	

Budget(s) to be charged	Account Number	Amount	Position No.	% of F.T.E.
	101-5050-000-1101	$20,000	P-63-	1.00
	220-5052-400-1101	2,000		

SPECIAL CONTRACTUAL CONDITIONS OR REMARKS

The University Code and the Rules and Disciplinary Procedures for Members of the University Community, as amended and most recently adopted by the Board of Regents prior to the date of this employment contract, are the official documents governing personnel matters and procedures concerning the professional staff. These published documents are available from the Vice President for Academic Affairs or the President's Office, and they are incorporated herein and by this reference made a part of this contract. This contract is not binding or of any legal effect until duly executed by both the appointee and the UNLV President.

I have reviewed this document and find it to be satisfactory. I recommend the document for approval and signature:

Michael Kachuluk 4/24/73
Dean/Departmental Chairman Date

Jeff Hess EXHIBIT JD
Vice-President FOR IDENTIFICATION Date
GARLAND L. WALKER, Notary Public

SEE ADDITIONAL TERMS ON REVERSE SIDE HEREOF

I accept all of the conditions listed above and on the reverse side of this page:

Jerry Tarkanian April 16, 19
Signature of Appointee Date

Accepted on behalf of the University of Nevada thereby making this document a contract:

Roman J. Zoro 4/24/73
President, University of Nevada, Las Vegas

MARKED FOR IDENTIFICATION
NCAA
Defendant's Proposed Exhibit I
A 123498

DEFENDANT'S EXHIBIT I NCAA A-173498

NCAA TRIAL EXHIBIT I

NCAA TRIAL EXHIBIT TT

UNIVERSITY OF NEVADA, LAS VEGAS

4505 Maryland Parkway Las Vegas, Nevada 89154
Office of the President

April 12, 1976

Mr. Jerry Tarkanian
Prof. of P.E. & Head Basketball Coach
University of Nevada, Las Vegas
Las Vegas, Nevada

Dear Mr. Tarkanian:

The University Senate at UNLV and the Faculty Senate at UNR recommended to the Regents that formal contracts not be issued to continuing faculty members but that letters be sent instead which would indicate to each person the rank and salary for the coming year. It was felt that all conditions of employment are adequately covered by the University Code and that the contract really served only one purpose for continuing people, and that purpose was to inform the individual of the rank and salary for the coming year. Therefore, we will save considerable time and effort in obtaining many signatures by simply sending a letter from this point forward.

I am, therefore, pleased to inform you that your rank and salary for the 1976-77 year will be:

Salary $32,000 Rank 4 Step 15.5+ Type Appointment A

We appreciate your contributions and services to the University during the present year, and we hope that the 1976-77 year will be a productive and stimulating year for you.

Sincerely,

/s/ Donald H. Baepler
Donald H. Baepler
President

DHB/pf

EMPLOYMENT CONTRACT ATTACHMENT

(Must Be Filed With First Contract)

I, Jerry Tarkanian, do solemnly swear (or affirm) that I will support, protect and defend the Constitution and Government of the United States, and the Constitution and Government of the State of Nevada, against all enemies, whether domestic or foreign, and that I will bear true faith, allegiance and loyalty to the same, any ordinance, resolution or law of any State notwithstanding, and that I will well and faithfully perform all the duties of the office of Head Basketball Coach Professor of Physical Education on which I am about to enter; (if an oath) so help me God; (if an affirmation) under the pains and penalties of perjury.

/s/ Jerry Tarkanian

Subscribed and sworn to before me this 16th day of April, A.D. 1973

/s/ Elise M. Hanseman
Notary Public

(Notary Seal)
Elise M. Hanseman
Notary Public—State of Nevada
County of Clark
My Commission Expires June 22, 1974

Supreme Court, U.S.
FILED
APR 29 1988
CLERK

No. 87-1061

In the Supreme Court of the United States

OCTOBER TERM, 1987

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Petitioner,

vs.

JERRY TARKANIAN,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether the action of the NCAA in directing one of its members, a state university, to show cause why it should not temporarily suspend an employee from his duties relating to intercollegiate athletics for violating the Association's rules, constitutes state action, where the member university, in compliance with NCAA rules, suspends the coach from coaching.

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No. 87-1061

In the Supreme Court of the United States

OCTOBER TERM, 1987

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Petitioner,

vs.

JERRY TARKANIAN,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF NEVADA

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Supreme Court of the State of Nevada (J.A. 45-61) is reported at 741 P.2d 1345 (Nev. 1987). The opinion of the Nevada district court (J.A. 16-44) is not reported.

JURISDICTION

The judgment of the Nevada Supreme Court was entered on August 27, 1987. This Court granted petitioner an extension of time to and including December 25, 1987 to file a petition for writ of certiorari. The petition for writ of certiorari was filed on December 23, 1987, and was granted on February 22, 1988. The jurisdiction of this Court rests on 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment XIV, Section 1, to the United States Constitution states, in relevant part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law.

42 U.S.C. § 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

University of Nevada Las Vegas ("UNLV") is a branch of the University of Nevada system and a member of the National Collegiate Athletic Association (the "NCAA") (NCAA's Trial Ex. 16, 175).[1] The NCAA is a private, voluntary association[2] of approximately 960 members[3] consisting of public and private four-year colleges and universities, conferences, associations and other educational institutions (Plaintiff's Trial Ex. 16, 148-175).

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1. All references to trial exhibits are cited herein as "Plaintiff's Trial Ex. " or "NCAA's Trial Ex. ". All references to the trial transcript are cited herein as "Tr. ". All references to the Joint Appendix are cited herein as "J.A. ".

2. Unless otherwise noted, all facts concerning the organization, rules and procedures of the NCAA discussed herein are applicable to and were in effect during all times relevant to this action. Many such facts are taken from the 1976-77 NCAA Manual, Plaintiff's Exhibit 16, pertinent portions of which are reproduced in the Joint Appendix at pages 77 through 110. The Association rules and procedures are updated and revised regularly by the membership. The enforcement program in particular (i.e., J.A. 97-110) has been the subject of numerous revisions and modifications (Tr. XI 2825-2830).

3. Article Four of the NCAA Constitution, as it appeared in the 1976-77 NCAA Manual and as reproduced in the Joint Appendix at page 82, sets forth guidelines for eligibility for membership in the Association:

> **Section 1. Eligibility for Membership.** Colleges, universities, other institutions of learning, athletic conferences or associations and other groups related to intercollegiate athletics, located in the United States, its territories or possessions, with acceptable academic standards as defined in the Bylaws, which accept and observe the principles set forth in the Constitution and Bylaws of the Association, are eligible for membership in this Association.

I. THE HISTORY AND STRUCTURE OF THE NCAA.

The NCAA was founded by a small group of colleges and universities in 1906, at the urging of President Theodore Roosevelt, primarily to adopt civilized rules of play for intercollegiate sports. The following are the two fundamental policies of the NCAA adopted by the membership:

> (a) The competitive athletic programs of the colleges are designed to be a vital part of the educational system. A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body, and by so doing, retain a clear line of demarcation between college athletics and professional sports.
>
> (b) Legislation governing the conduct of intercollegiate athletic programs of member institutions shall apply to basic athletic issues such as admissions, financial aid, eligibility and recruiting; member institutions shall be obligated to apply and enforce this legislation, and the enforcement program of the Association shall be applied to an institution when it fails to fulfill this obligation.

(J.A. 80).

The general policies and all rules of the Association are voted on by the member institutions at annual conventions (J.A. 86). Each member is entitled to one vote in matters voted on at Association meetings (J.A. 85). The NCAA Constitution, Bylaws and all other governing rules

and interpretations are set forth in the NCAA Manual, published annually (J.A. 86). Member institutions and their coaches (including Respondent Jerry Tarkanian as head coach of UNLV's intercollegiate basketball program [Tr. VIII 1981; XI 2902]) agree to abide by the rules and regulations adopted by member institutions which govern the conduct of intercollegiate athletics (J.A. 82). All member institutions are bound by such rules as an obligation of membership (J.A. 82).

The establishment and general policy of the Association between conventions is committed to the NCAA Council (J.A. 84). Members of the Council must be on the staff of a member institution, and are elected by the Association membership at the annual convention of the Association (J.A. 84).

In the early 1950's, the membership recognized a need to control the recruitment and professionalization of college athletes who, the membership felt, were being abused by some institutions. A majority of the members assembled at one of the annual conventions adopted a "sanity" code governing the recruitment, admissions, financial aid and eligibility of students who compete in intercollegiate athletics. This code also established an enforcement apparatus, which has existed with revisions and modifications since that time ("the enforcement program"), wherein each member agrees to conduct its intercollegiate athletic programs in accord with the membership rules, and to take appropriate action when infractions of the rules come to its attention (J.A. 81, 82, 97, 99, 106).

The Committee on Infractions (the "Committee"), one of the standing committees provided for in the Association's Bylaws (J.A. 94-95), is responsible for admin-

istering the Association's enforcement program (J.A. 97). The Association's enforcement program (J.A. 97-110) provides a structural framework for investigation and enforcement of the rules adopted by the Association membership (J.A. 97-98). Members of the Committee on Infractions (who, like the members of the Council, must be on the staff of a member institution [J.A. 95]) are appointed by the Council and act subject to the approval of the Council (J.A. 94). The Committee in 1976-77 was composed of three professors of law, one professor of mathematics and the Dean of a graduate school who were employees of five different member institutions.[4]

In administering the enforcement program, the Committee is guided by investigative and enforcement procedures adopted by the NCAA membership and published in the Official Procedures Section of the Manual (J.A. 97-110). Although the Committee is charged with administering the enforcement program, the chief investigative and enforcement functions of the program are the responsibility of the individual member institutions of the Association, as is noted in the preamble to the enforcement program:

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4. In the UNLV case, the members of the Committee were: Arthur Reynolds, Dean of the Graduate School, University of Northern Colorado, Chairman; Charles Alan Wright, Professor of Law, University of Texas; Harry M. Cross, Associate Dean and Professor of Law, University of Washington; John W. Sawyer, Professor of Mathematics, Wake Forest University; William L. Mathews, Professor of Law, University of Kentucky (Tr. VIII 1923).

Official Procedure Governing The NCAA Enforcement Program

As approved and adopted by the Council and Convention of the Association

Individuals employed by or associated with member institutions for the administration, the conduct or the coaching of intercollegiate athletics are, in the final analysis, teachers of young people. Their responsibility is an affirmative one and they must do more than avoid improper conduct or questionable acts. Their own moral values must be so certain and positive that those younger and more pliable will be influenced by a fine example. Much more is expected of them than of the less critically placed citizen.

All representatives of educational institutions are expected to cooperate fully with the NCAA investigative staff, Committee on Infractions and Council to further the objectives of the Association and its enforcement program. The enforcement procedures are an essential part of the intercollegiate athletic program of each member institution and require full and complete disclosure by all institutional representatives of any relevant information requested by the NCAA investigative staff, Committee on Infractions or Council during the course of an inquiry.

(J.A. 97).

II. THE PROCEDURES FOLLOWED IN IN THE UNLV CASE

In the early 1970's, the NCAA enforcement staff received several anonymous communications to the effect that violations of NCAA rules may have occurred at UNLV. By letter dated November 28, 1972 (NCAA Trial Ex. C), the President of UNLV was advised that the investigative staff was initiating a preliminary inquiry into the athletic policies and practices of UNLV (NCAA's Trial Ex. C). As was noted in that letter, the "purpose of the preliminary inquiry is to determine whether there is adequate evidence to warrant an official inquiry" (NCAA's Trial Ex. C). Although this "preliminary inquiry" was sent to the President of UNLV several months before Tarkanian was hired by UNLV, Tarkanian became head basketball coach of UNLV during the course of the subsequent investigation.

In 1976, based upon information learned by the investigative staff during the preliminary investigation which indicated several possible violations of membership rules, the Committee sent to UNLV an Official Inquiry (NCAA Trial Ex. D) and a Supplemental Official Inquiry (NCAA Trial Ex. E) which contained 78 detailed paragraphs of possible violations. The UNLV basketball program, under the operation of Mr. Tarkanian (Tr. XI 2902), was implicated in roughly one-half of the paragraphs.[5] This Official Inquiry, pursuant to membership policy (J.A. 99), asked

5. Although, as noted above, the investigation of the UNLV athletic department began before Tarkanian began his employment with UNLV, the Committee on Infractions and NCAA Council later determined Tarkanian was involved in a violation of NCAA legislation approximately two weeks after the date he began employment with UNLV (J.A. 186).

UNLV to investigate the allegations and report its findings to the Committee (NCAA Trial Ex. D, E). The Inquiry identified the membership rules, bylaws and constitutional provisions which were involved, as well as the circumstances and individuals who were involved in possible rules violations (NCAA's Trial Ex. D, E; Tr. VIII 1927, 1988-90). An Official Inquiry is intended to guide the institution to develop fully and independently as much or more information as was developed by the NCAA staff (J.A. 99; Tr. VIII 1926, 1934).

Consistent with the established enforcement procedure (J.A. 99), the NCAA enforcement staff continued to investigate the allegations. UNLV and Tarkanian and their respective lawyers also conducted their separate investigation (Tr. VIII 2142-44). The Committee had none of the discovery powers granted by judicial rules of procedure nor the subpoena powers ordinarily available to governmental entities. It had to rely upon the NCAA staff and UNLV (the member institution) to locate and obtain information from persons with pertinent information (J.A. 99; Tr. IX 2443, 2453). Some persons demanded and were promised confidentiality (Tr. IX 2453). Otherwise, they would not have disclosed information to the NCAA staff. After UNLV and Tarkanian and four lawyers working on their behalf conducted their separate investigation, they submitted a voluminous response wherein they contended that no vic tions of NCAA rules had occurred (Tr. IX 2175). Although many of the same persons were interviewed, the two separate investigations resulted in widely divergent conclusions concerning whether infractions had occurred (Tr. IX 2211-12).

UNLV requested and was granted a hearing with the Committee to defend itself and Jerry Tarkanian. Being a private association and possessing only the power

granted by the agreement between the member institutions, the Committee on Infractions could not compel witnesses to appear or to speak at the hearings (Tr. VIII 1934). Because it had no power to subpoena witnesses or administer oaths, the Committee had to rely on the good faith of the NCAA staff and UNLV to fairly report what their separate investigations had disclosed.[6]

In the course of the three separate hearings before the Committee which covered more than three full days over roughly one month's time, UNLV, Tarkanian and their respective counsel presented their version of the facts. They challenged the information presented by the NCAA staff and the credibility of the persons who supplied information to the staff, and attacked the investigative techniques and credibility of certain members of the NCAA staff (Tr. IX 2211-12, 2298, 2303). During the hearings, the staff withdrew several of the allegations regarding Tarkanian (Tr. IX 2301-02). Of the seventy-eight allegations contained in the Official Inquiry (NCAA's Trial Ex. D, E; Tr. IX 2426), the Committee on Infractions ultimately found thirty-eight violations of membership rules (Plaintiff's Trial Ex. 17).

The NCAA Enforcement Procedure adopted by the membership provides a broad range of disciplinary measures, from reprimand and censure to more severe sanctions in those instances where violations reflect a gen-

6. Generally the facts reported by the staff and the member institution are reasonably consistent and the Committee determines whether the facts constitute an infraction of the rules and what sanctions, if any, should be assessed. UNLV and Tarkanian, however, not only contested the facts as reported by the investigative staff but they challenged the integrity of the staff in investigating and reporting the facts to the Committee (Tr. IX 2303). This required the Committee and Council to assess the credibility of the investigative staff, the representatives of the institution who investigated the allegations and the purported facts reported by each of them (Tr. X 2594; XI 2764).

eral disregard for the governing rules (J.A. 102-109). A member institution which is found in violation may be required to show cause why further sanctions should not be imposed if it does not take appropriate disciplinary or corrective action against its representatives who are involved in the infractions (J.A. 104-105). Among such sanctions, the NCAA members have approved as appropriate disciplinary or corrective action the temporary suspension of the intercollegiate coaching duties of the head coach and any assistants involved in rules infractions, or severance of relations with the athletic program of any representatives of the institution's athletic interests ("boosters") who may be involved in infractions of the rules (J.A. 105).

The sanctions which the Committee recommended be taken against UNLV in this case, set out in full in the Joint Appendix at pages 178-181, included the following: public reprimand of UNLV along with a two year period of probation, during which the UNLV's intercollegiate basketball program would not be eligible to participate in any postseason basketball competition, nor appear on television (J.A. 178-179); a limit of three basketball scholarships to be given per year during the 1978-79 and 1979-80 academic years (J.A. 179); and an order that UNLV show cause why additional penalties should not be imposed upon it unless it took action to sever from any and all relations with its intercollegiate basketball program for two years its former assistant basketball coach, Fred Albrecht, and unless it took action to sever permanently from any and all relations with its intercollegiate athletic program its former head basketball coach, John Bayer[7], and eight named "boosters"

7. UNLV had fired Bayer as basketball coach in the spring of 1973 (J.A. 185).

(J.A. 180-181). That portion of the recommended sanction concerning Tarkanian (nearly identical to that noted above with respect to former assistant coach, Fred Albrecht) was as follows:

> The Committee on Infractions requests the University of Nevada, Las Vegas, to show cause, in accordance with Section 7-(a)-(12)-(i) of the Official Procedure Governing the NCAA Enforcement Program, pages 119-120, 1976-77 NCAA Manual [J.A. 103-106], why additional penalties should not be imposed upon the University if it does not take appropriate disciplinary and corrective actions with regard to:
>
> * * *
>
> 4. Head basketball coach Jerry Tarkanian which, in the Committee's present view, should be complete severance of any and all relations Tarkanian may have, formally and informally, with the University's intercollegiate athletic program during the period of the University's probation including, but not limited to, activities associated with administration, supervision, coaching, recruiting, athletic booster groups and public relations or fund-raising activities related to the University's athletic program.

(Plaintiff's Trial Ex. 17, 10; *See also* J.A. 180-181).

After the hearings, the Committee issued its written findings on the allegations and recommended disciplinary penalty measures in its Confidential Report, which it forwarded to UNLV on April 26, 1977 (Plaintiff's Trial Ex. 17). UNLV promptly appealed to the NCAA Council some 27 of the Committee's findings and most of the recommended sanctions (J.A. 122-204). UNLV did not appeal some findings and sanctions.[8] All findings and sanctions which involved Tarkanian personally or the intercollegiate basketball program as operated by Tarkanian were appealed (J.A. 122-204).

The Committee delivered to UNLV and to the Council, pursuant to Section 6 of the Enforcement Procedures (J.A. 102), an Expanded Confidential Report concerning each finding and proposed penalty appealed by UNLV (J.A. 122-204). This report included all of the allegations in the Confidential Report, identified the information on which the Committee relied in reaching its decision as to those violations being appealed, and articulated the Committee's rationale in arriving at its findings and proposed sanctions (J.A. 122-204). UNLV also submitted a lengthy written presentation to the Council prior to the hearing (Plaintiff's Trial Ex. 3).

On August 22, 1977, Tarkanian and his counsel, the President and other representatives of UNLV and its counsel, representatives of the NCAA investigative staff and the Chairman of the Committee on Infractions appeared before the NCAA Council (Tr. X 2592; J.A. 122). Professor Arthur Reynolds, Chairman of the Committee, appeared on behalf of the Committee and argued that the Committee's findings and sanctions were supported by facts (Tr. X 2593, 2730).

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8. Confidential Report No. 123(47), reproduced in the Joint Appendix at pages 122 through 204 (also referred to as the Expanded Confidential Report), contains all of the findings of violation of NCAA rules determined by the Committee on Infractions. Those findings and sanctions which were appealed by UNLV are identified by an asterisk (*) in the left margin.

Following the appeal hearing, the Council voted 16-0 to affirm the findings of the Committee on Infractions and to adopt its suggested sanctions (Tr. X 2615). On August 25, 1977, the Council notified UNLV officials that it had accepted the Committee's findings and sanctions. As noted above, one of the proposed disciplinary measures recommended by the Committee was a direction to UNLV to show cause why its remedial action should not include the suspension of Tarkanian from involvement in intercollegiate athletics for the 1977-78 and 1978-79 basketball seasons (J.A. 180-181).

In accord with the NCAA Enforcement Procedures (J.A. 105), the President of UNLV immediately directed his Vice President to convene an administrative hearing for the purpose of allowing Tarkanian an opportunity to present reasons why UNLV should not carry out the recommendation of the Committee and Council that an appropriate disciplinary action would be temporary suspension of Tarkanian from involvement in UNLV's intercollegiate athletic program (J.A. 71).[9] Tarkanian and his counsel participated in that hearing, which took place on September 6, 1977 (J.A. 71). Tarkanian and his counsel argued that the NCAA proceedings were unfair and that the evidence did not support the Committee's

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9. At the time of this hearing, Tarkanian's employment with UNLV was as "Head Basketball Coach and Professor of Physical Education" (J.A. 67). On June 20, 1977, subsequent to the hearings before the Committee on Infractions but prior to the appeal hearing before the Council, Tarkanian had entered into this contract (J.A. 67). This was the first contract between Tarkanian and UNLV which mentioned tenure (*compare* J.A. 207-208 *with* J.A. 67). Although the directive of the Committee on Infractions and Council was that UNLV show cause why Tarkanian should not be temporarily suspended from his coaching duties, the show cause order did not address Tarkanian's employment as a tenured "Professor of Physical Education" (J.A. 181). Indeed, that Tarkanian was to have continued "employment duties" notwithstanding the show cause order is uncontroverted (J.A. 70).

finding that he participated in violations (J.A. 71-76). Tarkanian did not contend that his coaching position was protected by contract, tenure or any other employment relationship he had with UNLV.

On September 7, 1977, Tarkanian was advised by the President of UNLV that he would be suspended from relations with the University's intercollegiate athletic program for two years (J.A. 69-70).

III. PROCEEDINGS IN THE LOWER COURTS

On September 8, 1977, Tarkanian sued UNLV in a Nevada state court (J.A. 16-17). The NCAA was not joined in that action and UNLV refused to remove the action to federal court. Tarkanian sought injunctive relief from the sanctions imposed by the University the day before (J.A. 2). A trial was held roughly one month later, on October 12, 1977 (J.A. 17). The trial court granted Tarkanian the injunctive relief sought, based upon joint stipulations of fact of the parties and the testimony of Tarkanian and four other witnesses called by Tarkanian (J.A. 17). At this trial, "No witnesses were presented for the defense" (J.A. 8). The Nevada Supreme Court reversed for failure to join an indispensable party, the NCAA (J.A. 15).

Tarkanian commenced the second phase of this lawsuit in July, 1979 against both UNLV and the NCAA (J.A. 17). Within 30 days, the NCAA and UNLV filed a joint petition for removal to the United States District Court for the District of Nevada. The case was remanded on motion of Tarkanian, for failure of UNLV to timely remove, in that UNLV had failed to remove within 30 days of receipt of service of process in 1977.

Following remand, the case proceeded to trial in state court. After a two-week bench trial, the trial judge agreed with Tarkanian on most issues (J.A. 16-35). The trial court issued an opinion on June 25, 1984 that the actions of the NCAA constituted state action and that Tarkanian had been deprived of liberty and property interests without procedural and substantive due process of law, all in violation of 42 U.S.C. § 1983 and the Fourteenth Amendment to the Constitution (J.A. 16-35). The trial court permanently enjoined the University and the NCAA from suspending Tarkanian, and from taking any action to enforce the NCAA's sanctions (J.A. 33-35). The trial court later awarded to Tarkanian attorney's fees of nearly $200,000 (J.A. 41-42). The trial court assessed 90% of the fees to NCAA and 10% to UNLV (J.A. 41-42).

The NCAA filed a second petition for removal on July 17, 1984 for two reasons. First, the NCAA contended that it had become apparent at the second trial that the University had been joined as the only original defendant for the purpose of thwarting removal by the NCAA, and that it should be realigned as a plaintiff. Second, Tarkanian's request for attorney's fees under 42 U.S.C. § 1988 constituted a new and independent federal action for removal. The Federal District Court again remanded the case to state court for failure of UNLV to timely petition for removal.

The trial court's judgment was appealed by the NCAA to the Nevada Supreme Court. UNLV did not appeal the trial court's injunction and assessment of attorney's fees. The Nevada Supreme Court, in an opinion issued August 27, 1987, affirmed in most respects (J.A. 45-61). First, it found the NCAA to be a state actor (J.A. 52). Second, it found NCAA procedures did not afford Tarkanian "due process of law" under "the circumstances

of the case" (J.A. 55-58). The Nevada Supreme Court limited the injunction to those penalties imposed with respect to Tarkanian in Confidential Report Number 123 (47) (J.A. 122-204) and UNLV's adoption of those penalties (J.A. 61). It also remanded the issue of the award of attorney's fees against the NCAA under 42 U.S.C. § 1988 to the district court for a reduction in amount (J.A. 58-60). Thereafter, Tarkanian moved the Court for an allowance of attorney's fees of $99,111.50 for services performed on appeal. The Nevada Supreme Court transferred that motion to the trial court for hearing (J.A. 64). The matter of attorney's fees to be assessed against the NCAA is still pending.

SUMMARY OF ARGUMENT

The respondent ("Tarkanian") claims that the National Collegiate Athletic Association ("NCAA") deprived him of liberty and property rights without due process of law, in violation of the Fourteenth Amendment to the United States Constitution and of 42 U.S.C. § 1983. To sustain this claim, and a claim for attorney's fees, he must establish that the NCAA's hearings and determinations concerning the intercollegiate athletic program of the University of Nevada at Las Vegas ("UNLV") constituted "state action".

Under this Court's 1982 decision in *Lugar v. Edmondson Oil Company, Inc.*, 457 U.S. 922 (1982), the respondent's required state action showing consists of two necessary elements. If either is lacking, there is no state action. First, respondent must show that "the deprivation [was] caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible." *Id.* at 937. Second, he must establish

that "the party charged with the deprivation [was] a person who may fairly be said to be a state actor." *Id.*

Tarkanian's case fails because he can make neither of the required showings. The substantive source of any deprivation Tarkanian suffered was not a statute, regulation or any other governmental policy. The only source of authority for the NCAA's action was its own regulations, promulgated and enforced by the Association for the purpose of ~~maintai~~ining satisfactory standards of sportsmanship, scholarship and amateurism in the conduct of its intercollegiate athletic programs. The NCAA did not rely upon any statute, regulation, policy or custom of UNLV or the State of Nevada in taking any action of which Tarkanian complains. The lower courts' reliance upon the fact that UNLV is a public institution completely misses the point. The NCAA is a private, voluntary association composed of both public and private members The rules that it enforces—the focus of *Lugar's* first prong—are applied equally to the intercollegiate athletic programs of public and private member institutions. In either instance, the NCAA acts under private rules.

Tarkanian's case also fails to satisfy *Lugar's* second prong. The Nevada Supreme Court concluded that the NCAA was a state actor because it had exercised a power that is traditionally and exclusively the prerogative of the sovereign, namely, the discipline of UNLV's employee. That conclusion rests on a faulty premise. The NCAA did not and could not suspend Tarkanian from coaching for two years or otherwise change his employment relationship. The NCAA simply determined the conditions under which UNLV would be permitted to continue to participate in the Association's activities. The only action

taken by the NCAA was to determine that its standards of conduct regarding intercollegiate athletics had been breached and that UNLV's temporary suspension of Tarkanian would be an appropriate corrective action. The setting of standards for competition in intercollegiate athletics and the determination of whether those standards have been breached are not traditionally exclusive state prerogatives.

Furthermore, Tarkanian also has failed to establish a nexus between the state and the NCAA's imposition of sanctions sufficient to establish that the NCAA was a state actor when it determined the conditions upon which UNLV would be permitted to remain in good standing. UNLV did not make or contribute to the decision that ultimately led to Tarkanian's lawsuit. In fact, UNLV actively opposed the NCAA Committee on Infractions and Council proceedings and very reluctantly adopted the Committee's suggestion that an appropriate corrective action would be to temporarily suspend Tarkanian from UNLV's intercollegiate basketball program. Thus, the action of which Tarkanian complained was the action of a private, voluntary association, the NCAA. It was the NCAA which determined that its rules had been violated, and it was the NCAA which took steps that in its judgment were appropriate to fulfill the NCAA policies and principles.

The only arguable state action occurred when the University *responded* to the Association's application of its rules to UNLV and Tarkanian. UNLV's response was to temporarily suspend Tarkanian. That response, however, was UNLV's action, not the NCAA's.

In order to succeed against the NCAA, Tarkanian must show both that his deprivation resulted from application of a governmental rule, and that it was implemented either by a state actor or someone for whom the state is responsible. He has shown neither. He therefore has failed to make out a Fourteenth Amendment claim against the NCAA.

ARGUMENT

This case involves the holding of a Nevada trial court (J.A. 16-44), affirmed by the Supreme Court of Nevada (J.A. 45-61), that the NCAA and UNLV deprived Tarkanian of property and liberty rights without adequate process required by the Fourteenth Amendment to the United States Constitution. By its terms, the Fourteenth Amendment,[1] and its companion statute, 42 U.S.C. § 1983,[2] impose a due process requirement only on the actions of states. They impose no limitations on the conduct of private actors. Thus, the judgment can-

1. The Amendment reads, in relevant part: "No State shall . . . deprive any person of life, liberty or property without due process of the law."

2. 42 U.S.C. § 1983, which was enacted pursuant to the authority of Congress to enforce the Fourteenth Amendment, prohibits interference with federal rights under color of state law. *Rendell-Baker v. Kohn*, 457 U.S. 830 838 (1982). It states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

For the purposes of this brief, the NCAA will assume that the conduct proscribed by the Fourteenth Amendment and Section 1983 is the same and will be termed "state action."

not stand unless the NCAA's imposition of sanctions against the UNLV intercollegiate basketball program constituted state action.

Because the Fourteenth Amendment literally proscribes only action by states, this Court originally applied constitutional restraints to government actors only. *See, e.g., Raymond v. Chicago Union Traction Co.*, 207 U.S. 20 (1907) (administrative agencies); *Saunders v. Shaw*, 244 U.S. 317 (1917) (courts); *Lovell v. City of Griffin, Ga.*, 303 U.S. 444 (1938) (municipal ordinances). Accordingly, it was implicit that the Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful." *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349 (1974). Few private actors were held subject to the Fourteenth Amendment or Section 1983 before World War II.

I. PRIVATE ACTION MAY BE TREATED AS STATE ACTION UNDER THE FOURTEENTH AMENDMENT ONLY WHEN IT IS FAIRLY ATTRIBUTABLE TO THE STATE

From 1946[3] until the early 1970's, state action was extended to private entities in a number of cases. Two distinct models developed for reaching private action. The earliest cases involved performance by a private party of vital and comprehensive governmental functions. In

3. Arguably, the expansion of state action doctrine to the private sector was foreshadowed in the so-called *White Primary Cases*, decided between 1927 and 1953. *Nixon v. Herndon*, 273 U.S. 536 (1927); *Nixon v. Condon*, 286 U.S. 73 (1932); *Smith v. Allwright*, 321 U.S. 649 (1944); *Terry v. Adams*, 345 U.S. 461 (1953). All four cases involved racial discrimination in primary elections in Texas.

Marsh v. State of Alabama, 326 U.S. 501 (1946), this Court considered a First Amendment challenge to the trespass conviction of a Jehovah's Witness for distributing religious literature in a company town. Although the town had many of the indicia of a municipality, it was not a formal government entity. The Court held, nevertheless, that the owners of the town were subject to the restraints of the Fourteenth Amendment, terming the operation of a company town a "public function". *Id.* at 506, 507. By 1968, this public function test had been applied successfully to a privately owned park, *Evans v. Newton*, 382 U.S. 296 (1966), political party primaries, *Terry v. Adams*, 345 U.S. 461 (1953), and a privately owned shopping center, *Amalgamated Food Emp. Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968). Each such case concerned the exercise by a private party of some function or power traditionally associated with sovereignty.

A second, more subtle application of the state action doctrine arose in cases where a private party was the vehicle for carrying out a policy firmly associated with the state. In *Shelley v. Kraemer, supra*, for instance, a racially restrictive covenant forbidding the transfer of a white homeowner's land to nonwhites was held to be an unconstitutional denial of equal protection. Government involvement was found in state court enforcement of the restrictive covenant. 334 U.S. at 17-18. *Shelley v. Kraemer* focused on the entanglement or connection between the government and the private entity. This connection, or "nexus", required some degree of direct government involvement. Over a relatively short period of time, the Court extended state action to other entities significantly connected to the state. *See, e.g., Public*

Utilities Commission v. Pollak, 343 U.S. 451 (1952); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

Even as it identified circumstances under which private actors could be state actors, however, this Court made it clear that the Fourteenth Amendment did not apply to a private entity simply because it "receives any sort of benefit or service at all from the State, or [because] it is subject to state regulation in any degree whatever." *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173 (1972). Thus, racially discriminatory conduct by a private club in *Moose Lodge* was not constrained by the Fourteenth Amendment where the individual could not trace his injury to the state's regulatory involvement. The Court upheld the value of associational privacy where the governmental licensing practice (*i.e.*, the State's award to the club of a liquor license) did not influence the Lodge's discriminatory policy.

Similarly, in *Jackson v. Metropolitan Edison Co., supra*, the Court held that respondent's status as "a heavily regulated, privately owned utility, enjoying at least a partial monopoly," together with action which was "found permissible under state law," was "not sufficient to connect the State . . . with respondent's action." 419 U.S. at 358. Rather, the Court demanded "a sufficiently close nexus between the State and *the challenged action* of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Id.* at 351 (emphasis added). Because the petitioner had not shown that the State was "sufficiently connected with respondent's action in terminating petitioner's service," she had failed to make out a claim under the Fourteenth Amendment. *Id.* at 358.

The Court's rationale for limiting the circumstances in which private action can be imputed to the State is that due process and equal protection requirements can impinge significantly upon legitimate associational activities and private choices, which the Constitution plainly was not intended to forbid and, in fact, may even protect. "Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982). Thus, it is not the province of the judiciary to interfere with these private associational activities, unless they have clearly lost their private character and have become actions fairly attributable to the state.

Prior to 1982, this Court generally analyzed each state action case by "sifting facts and weighing circumstances" carefully to determine whether subtle involvement by the state warranted treating apparently private conduct as state action. *Burton v. Wilmington Parking Authority*, 365 U.S. at 722. And it remains true today that the question of what conduct constitutes state action "frequently admits of no easy answer." *Moose Lodge*, 407 U.S. at 172.

Nevertheless, in *Lugar v. Edmondson Oil Co., supra*, this Court provided an analytical framework within which the "facts and circumstances" of each case may be evaluated. The primary inquiry is whether the private conduct allegedly causing the deprivation of a constitutional right can be "fairly attributable to the State." 457 U.S. at 937. The Court posed two central questions to characterize this fair attribution, both of which must be answered in the affirmative to support conversion of private action into state action. First, has the "claimed deprivation . . . resulted from the exercise

of a right or privilege having its source in state authority[?]" And, second, can the actors "be appropriately characterized as 'state actors'[?]" *Id.* at 939.

With these two questions, *Lugar* sharply focused the inquiry: courts must first ask whether the challenged conduct results from state law, such as a statute or regulation, or from a private source. If the source of authority is not the state, the inquiry ends, for there is no state action. *Polk County v. Dodson*, 454 U.S. 312 (1981).

Where the deprivation has its source in state authority, the court must still consider whether the private person "may fairly be said to be a state actor." *Lugar*, 457 U.S. at 937. This inquiry focuses on whether the private party "has acted together with or has obtained significant aid from state officials, or [whether] his conduct is otherwise chargeable to the State." *Id.* Without this second test, "private parties could face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them." *Id.* If a sufficient nexus does not exist, again the inquiry must end, for there is no state action.

II. TARKANIAN'S ALLEGATIONS IN THIS CASE FAIL TO SATISFY EITHER OF THE REQUIREMENTS IDENTIFIED IN LUGAR

The court below held, in a single paragraph at the end of its state action analysis, that the NCAA satisfied both the "state law" and "state actor" elements of the *Lugar* test (J.A. 52). In order to demonstrate the Nevada Supreme Court's error, we will first show that the NCAA

acted under its own law in adopting and enforcing rules regarding the governance of intercollegiate athletic competition among member schools, and not the law of any state. We will then demonstrate that, under this Court's precedents, the NCAA cannot fairly be said to be a state actor.[4]

A. The NCAA's Action Is Attributable To Private Rules And Not To State Law

It is easier in some instances than in others to determine whether a private entity acts under state law or private rule. However, in every case the inquiry must be made: can the action by the private party be "ascribed to a governmental decision[?]" *Lugar*, 457 U.S. at 938. Some action, such as eminent domain, *Jackson v. Metropolitan Edison Co.*, 419 U.S. at 353, or statutory prejudgment attachment, *Sniadach v. Family Finance Corp. of Bayview*, 395 U.S. 337 (1969), *Fuentes v. Shevin*, 407 U.S. 67 (1972), will clearly derive from state law.

Just as clearly, state action can be summarily rejected if the private actor is operating under private

4. Prior to *Lugar*, several lower courts held that regulatory activity by the NCAA constitutes state action. *See Howard University v. N.C.A.A.*, 510 F.2d 213 (D.C. Cir. 1975); *Parish v. N.C.A.A.*, 506 F.2d 1028 (5th Cir 1975); *Associated Students, Inc. v. N.C.A.A.*, 493 F.2d 1251 (9th Cir. 1974). These decisions found the required state action principally in the fact that some of the NCAA's member institutions are state schools. However, this Court's decisions in *Lugar*, *Rendell-Baker v. Kohn*, *supra*, and *Blum v. Yaretsky*, 457 U.S. 991 (1982), completely undermined the basis for these prior holdings. Indeed, recent lower court decisions which have faced the issue—with the exception of the Nevada Supreme Court in this case—have consistently held that NCAA regulation is not state action. *See Karmanos v. Baker*, 816 F.2d 258 (6th Cir. 1987); *Graham v. N.C.A.A.*, 804 F.2d 953 (6th Cir. 1986); *Arlosoroff v. N.C.A.A.*, 746 F.2d 1019 (4th Cir. 1984); *Hawkins v. N.C.A.A.*, 652 F.Supp. 602 (C.D. Ill. 1987); *Kneeland v. N.C.A.A.*, 650 F.Supp. 1047 (W.D. Tex. 1986); *McHale v. Cornell Univ.*, 620 F.Supp. 67 (N.D.N.Y. 1985).

rules. For example, in *Polk County v. Dodson, supra*, the plaintiff alleged that several of his constitutional rights were violated by a public defender who refused to prosecute an appeal she considered frivolous. This Court observed that the public defender acted according to the canons of professional ethics in a role adversarial to the state, and not on the basis of state law. Because those canons are private rules adopted by lawyers, and because the plaintiff could point to no rule of conduct or policy for which the state was responsible, the actions of the public defender in representing her client were not fairly attributable to the state. 454 U.S. at 320-25. The fact that the public defender was a full time state employee, working in an office fully funded and extensively regulated by the state, did not warrant a finding that she was acting under color of state law. *Id.* at 322 n.13.[5]

It is not enough that a state statutory scheme exists which permits the action taken by the private party. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 160 n.10 (1978) ("It would intolerably broaden, beyond the scope of any of our previous cases, the notion of state action under the Fourteenth Amendment to hold that the mere exis-

5. *See also Gilmore v. Salt Lake Community Action Program*, 710 F.2d 632 (10th Cir. 1983), where the plaintiff raised constitutional challenges to his termination of employment by a Utah community action agency, a state entity. The court found the discharge did not "in any way [reflect] a governmental policy or decision", *Id.* at 639, despite the fact the agency's board, which formulated the personnel policies under which plaintiff was fired, was composed partially of public officials. "Although the public officials serve on the board as representatives of local government and as advocates of governmental objectives, there are no allegations that they represent or advocate a governmental position on personnel policy." *Id.* at 638-39. Thus, the termination of plaintiff was not a result of state law.

tence of a body of property law in a State, whether decisional or statutory, itself amounted to 'state action' even though no state process or state officials were ever involved in enforcing that body of law."). Nor is it sufficient that the state "acquiesce[s]" in the private conduct. *Id.* at 164 ("This Court, however, has never held that a State's mere acquiescence in a private action converts that action into that of the State."). Rather, the state must, by its statutes, customs or decisions, order or compel the offending conduct. *Id.; Moose Lodge No. 107 v. Irvis,* 407 U.S. at 176-77.[6] Otherwise, the action is private and the inquiry ends.

In a companion case to *Lugar,* this Court demonstrated that decisions made by private entities, to which the state merely "reacts", are not fairly ascribable to the state, despite extensive state regulation and funding of the private entities. *Blum v. Yaretsky, supra.*[7] In *Blum,* the State of New York, as a participant in the Medicaid program established by the Social Security Act, 42 U.S.C. § 1396 *et seq.* (1976 as amended), provided

6. Two opinions of this Court illustrate the requirement of government compulsion or order.

In *Peterson v. City of Greenville,* 373 U.S. 244 (1963), the black petitioners were convicted of trespass under city ordinances requiring separation of the races in restaurants. State action was clear because the city compelled the private act of discrimination, thereby removing that decision from the sphere of public choice.

In *Moose Lodge, supra,* on the other hand, a black patron sued a private club under Section 1983 for refusing to serve him. This Court rejected his argument that state action could be found in the state's regulation of the club's liquor license, for the liquor regulations in no way compelled or even influenced the challenged conduct. Those regulations that did affect the Moose Lodge were unconnected with its discriminatory policies. Thus, the Moose Lodge, in refusing to serve plaintiff, acted under private rules, not state regulations.

7. This case was decided the same day as *Lugar.*

assistance to eligible persons in private nursing homes. The nursing homes were designated as either "skilled nursing facilities" (SNF) or "health related facilities" (HRF), the latter providing less extensive, and generally less expensive, medical care than the former. 457 U.S. at 993-94.

The plaintiffs were Medicaid patients in an SNF who were transferred to a lower level of care in an HRF. *Id.* at 995. On behalf of a class of Medicaid-eligible residents of New York, plaintiffs challenged, among other things, decisions made by physicians and nursing home administrators to transfer them to lower levels of care without notice or hearing as violative of the Due Process Clause of the Fourteenth Amendment. *Id.* at 995-96, 1003, 1005. The District Court and the Court of Appeals agreed and permanently enjoined the transfers, holding that the decisions involved state action. *Id.* at 998.

This Court reversed, finding no nexus between the state and federal Medicaid regulations and the nursing homes' decisions to transfer patients to lower levels of care.[8] *Id.* at 1012. The plaintiffs, it noted, were not challenging any particular state regulation or procedure, but rather the decisions of nursing homes and physicians, which were private parties. *Id.* at 1003, 1005. These decisions were not compelled or even "influenced in any degree" by the state. *Id.* at 1005. That the state "responds" to such actions by adjusting patients' benefits "does not render it *responsible* for those actions." *Id.* (emphasis in original).

8. The Court first addressed the standing of the patients to challenge facility-initiated transfers, and found that a threatened decrease in medical benefits was sufficient to grant standing. *Blum v. Yaretsky,* 457 U.S. at 1000, 1002.

Nor did the extensive regulations governing Medicaid, including the requirements that nursing homes take all steps possible to transfer patients to appropriate levels of care, and complete and file with the state patient care assessment forms for review by the state, affirmatively command the particular transfer decisions. *Id.* at 1006-08, 1010.[9] The decisions were "medical judgments made by private parties according to professional standards that are not established by the State." *Id.* at 1008. In other words, decisions to transfer patients were not "dictated by any rule of conduct imposed by the State". *Id.* at 1009. Although patient transfers were authorized and, indeed, encouraged by state and federal regulations in order to promote economy and efficiency in nursing facilities and to save the government money, *id.* at 1006 n.16, 1008 n.19, the transfers only occurred after the decision was made by private physicians that the patient was receiving (and paying for) care not needed. *Id.* at 1008 n.19. "The State is simply not responsible for *that* decision, although it clearly responds to it." *Id.* (emphasis in original).[10]

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9. Nor was it significant that the physicians used a medical evaluation form devised by the Department of Health, for the physicians used their own medical judgment to complete the form. *Blum v. Yaretsky*, 457 U.S. at 1006 n.15. These physicians, who were not state employees, made the decision whether the patient received a high or low score on the form. *Id.* at 1006 n.16.

10. This Court did not find the requisite "substantial government encouragement" or "coercion" in Medicaid statutes that required the State to periodically send medical review teams to conduct on-site inspections of all SNF and HRF nursing homes. While acknowledging that these inspections could result in transfers of patients, which might involve state action, that did not occur in that case. *Blum v. Yaretsky*, 457 U.S. at 1009 n.21. Thus, the mere existence of a scheme by which the state *might* become involved in transfer decisions was not enough to find state action where the particular transfer complained of was not in fact made in this way. *Id.*

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The court below held that the alleged deprivation of Tarkanian's right had its source in state authority "because no third party could impose disciplinary sanctions upon a state university employee unless the third party received the right or privilege from the university" (J.A. 52). The court misapplied *Lugar* in so finding.

The "law" applied by the NCAA is its own. The Association is governed by a constitution, bylaws and executive regulations contained in a Manual (J.A. 86). The linchpin of its organizational structure is the promise of its members "to administer their athletic programs in accordance with the Constitution, the Bylaws and other legislation of the Association." NCAA Const., Art. 4 § 2(a) (J.A. 82).[11] NCAA rules apply equally to public and private universities and colleges.

The NCAA adopts its governing legislation through annual conventions, at which all member institutions are represented (J.A. 85). It is through these conventions that it promulgates rules to ensure minimum standards

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Footnote continued—

Nor were regulations which imposed a range of penalties on nursing homes that failed to transfer patients whose continued stays were medically unnecessary controlling, because "those regulations themselves do not dictate the decision to discharge or transfer in a particular case." *Id.* at 1009-10. That the state and federal regulations "encouraged" the nursing homes to transfer patients to less expensive facilities was also not controlling. *Rendell-Baker v. Kohn, supra*, 457 U.S. at 841 (reviewing the Court's holding in *Blum*).

11. This Court has previously acknowledged the beneficial role the NCAA plays in the regulation of intercollegiate athletics. "The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics. . ." *N.C.A.A. v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 120 (1984).

for scholarship, sportsmanship and amateurism (J.A. 79-80, 85).

Between conventions, the establishment and direction of the NCAA's general policy is entrusted to a Council of the members, elected at the annual convention (J.A. 84). The Council selects members to the various Committees that serve the NCAA (J.A. 94). One of these Committees, the Committee on Infractions, is empowered to enforce NCAA rules and impose sanctions on member institutions which violate the rules (J.A. 97).

In this case, Tarkanian and other representatives of UNLV were found by the NCAA Committee on Infractions and Council to have violated several rules regarding recruiting and extra benefits to student-athletes.[12] Among other sanctions, the Committee ordered UNLV to show cause why Tarkanian should not be suspended from participation in the activities of the University's intercollegiate athletic program (J.A. 180-81).[13] These findings

12. Among other violations, the NCAA Committee on Infractions found, and the NCAA Council on appeal affirmed, that Tarkanian arranged a grade of "B" for a student-athlete in violation of NCAA Bylaw 1-1-(a) (J.A. 158-160); provided free airline transportation for at least one student-athlete in violation of NCAA Const. §§ 3-1-(g)-(5), 3-1-(g)-(6) and 3-4-(a) (J.A. 124-28); pressured one athlete and his family to not cooperate with the NCAA in violation of NCAA Const. § 3-6-(a) and Bylaw 7-5-(d) (J.A. 141-50); and falsely certified his program was in compliance with NCAA rules in violation of NCAA Bylaw 4-6-(d) (J.A. 176-78).

13. UNLV disputed the Committee's findings, but acquiesced in its decision (J.A. 69-70, 71-76). Following a hearing before a university official, Tarkanian was suspended for two years from relations with UNLV's intercollegiate athletic program (J.A. 69-70). Tarkanian's employment was unaffected except as it related to NCAA-governed activities, *i.e.*, intercollegiate athletics (J.A. 70). The NCAA took no part in disciplining respondent (J.A. 69-70). It did not participate in, or appear at, the University hearing (J.A. 71).

were not made at the request of, or under the compulsion of, any state or government. Tarkanian has never urged any such state authority. Rather, he has steadfastly maintained that the deprivation of which he complains resulted from action taken by the NCAA (Tr. XI 2959).

There is no suggestion in the record or in the findings of the courts below that Nevada statutes, regulations or customs were employed, either overtly or covertly, by the Association's members in adopting rules regarding recruiting or extra benefits or in the Committee's enforcement of those rules. To the contrary, the record and opinions below are replete with references to the adversity of UNLV to these findings.

As we have seen, the challenged conduct must have its source in state law. That the state "reacts" to a private decision is insufficient to meet the first *Lugar* test. The NCAA member schools adopt and maintain the NCAA rules, not as individual institutions, but as members of a private association. The rules that UNLV violated are no more UNLV's rules than they are the rules of a private university; they are no more governmental in source when applied to UNLV than when applied to a private university. In either case, they were adopted by a voluntary, private association for the governance of that association and its members. This is insufficient to meet the first *Lugar* test.

B. The NCAA Is Not A State Actor

Even if the NCAA could be found to have acted under a rule or privilege of the State, it did not engage in state action in this case because it cannot "fairly be said to be a state actor." *Lugar,* 457 U.S. at 937. A party may be a state actor "because he is a state official, because he has acted together with or obtained significant aid from state officials, or because his conduct is otherwise chargeable to the state." *Id.* It is not enough, however, that the private party acts under state authority or statute. "Something more" is needed. *Id.* at 939.

Lugar identified four tests under which the Court has determined, in different contexts, whether a private party is a state actor: the "public function test", the "state compulsion test", the "nexus test" and the "joint action test". *Id.* at 939. The Nevada Supreme Court held that the NCAA was a state actor under both the "public function" (J.A. 51) and "nexus" (J.A. 52) standards.[14] In fact, however, the NCAA does not perform a "public function" for purposes of Fourteenth Amendment standards, nor was there a sufficient "nexus" between UNLV and the NCAA's action in this case to establish state action. The Nevada Court therefore erred in concluding that the NCAA was a state actor.

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14. The other two standards clearly are not met here. The "state compulsion" test applies when the state dominates the private entity. State compulsion is demonstrated, for instance, when a state law requires a private person to refuse service because of race. *See Peterson v. City of Greenville, supra; Baldwin v. Morgan,* 287 F.2d 750 (5th Cir. 1961). This test obviously has elements in common with the first prong of *Lugar,* and as demonstrated in our earlier discussion, no showing of compulsion has been made here.

The "joint action" test was limited in *Lugar* to prejudgment attachment cases, 457 U.S. at 939 n.21, although the Court has

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1. The NCAA Does Not Perform A Public Function

The "public function"[15] standard is this Court's oldest test for determining whether a private party is a state actor. The prototypical public function case is *Marsh v. State of Alabama, supra,* in which this Court found that a corporation performed a public function when it governed a company town. The Court's more recent cases make clear, however, that the private activities which can fairly be characterized as public functions for state action purposes are strictly limited.

These limitations most clearly appear in *Jackson v. Metropolitan Edison Co., supra.* The plaintiff contended in *Jackson* that the defendant utility performed a public function because it "provides an essential public service." 419 U.S. at 352. This Court noted, however, that "[d]octors, optometrists, lawyers . . . and [a] grocery selling a quart of milk are all in regulated businesses, providing arguably essential goods and services, 'affected with a public interest'." *Id.* at 354. In order not to subject all of these entities to constitutional restraints, the Court

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Footnote continued—

occasionally equated it with a nexus analysis. *See, e.g., Blum v. Yaretsky,* 457 U.S. at 1010-11 (analyzing the "joint participation" of nursing homes and the state in a decision to transfer Medicaid patients); *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee,* 55 U.S.L.W. 5061, 5068 n.29 (1987) (the federal government is not a "joint participant" because it did not exert any influence over the exercise of the Olympic Committee's enforcement decision). Because this is not a prejudgment attachment case, the "joint participation" standard is no different from the "nexus" standard which, as we show, is not satisfied in this case.

15. The term "public function" was coined by Justice Black in *Marsh v. State of Alabama, supra,* 326 U.S. at 506, 507.

limited the public function strand of state action analysis to activities "traditionally associated with sovereignty, such as eminent domain." *Id.* at 353. The relevant question is whether the activity is "traditionally the exclusive prerogative of the State." *Id.*

Subsequent cases have reaffirmed the Court's limited definition of "public functions."[16] In *Flagg Bros., Inc. v. Brooks, supra,* the plaintiff argued that a state statute, which authorized a bailor to sell goods entrusted to him for storage, delegated an exclusive state function to the bailor. The Court held, however, that "the settlement of disputes between debtors and creditors is not traditionally an exclusive public function." 436 U.S. at 161. The Court further noted that "[w]hile many functions have been traditionally performed by governments, very few have been exclusively reserved to the State," *id.* at 158, and suggested that even such activities as education, fire and police protection, and tax collection may not satisfy the public function standards. *Id.* at 163. It has since been held that education of children with special needs is not "the exclusive province of the State." *Rendell-Baker v. Kohn, supra,* 457 U.S. at 842.

In determining whether a private actor is performing an exclusive state function, this Court has focused on the overall course of conduct of the private entity rather than on the specific conduct being challenged. For example, in *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, supra,* the plaintiffs challenged the U.S. Olympic Committee's refusal to allow the use of the trademark "Olympic" in conjunction with the plaintiffs' proposed athletic event ("Gay Olympics"). In response to an argument that the Olympic Committee was performing a public function and thus was subject to First Amendment constraints, this Court held that "[n]either the conduct nor the coordination of amateur sports has been a traditional governmental function." 55 U.S.L.W. at 5067. This holding recognizes that, in determining whether an entity is performing a "public function," the proper focus is on the entity's overall conduct and purpose.

Thus, in performing its public function analysis, this Court should focus on the NCAA's activities generally rather than on any particular action it took here.[17] The utility customer in *Jackson v. Metropolitan Edison Co.*, and the Jehovah's Witness in *Marsh v. State of Alabama* challenged specific conduct of the entities in question (*i.e.*, termination of service and restriction of distribution of literature). This Court, however did not focus on the specific conduct, but rather on the broader nature of Metropolitan Edison's business (generating and supplying electricity) and the Gulf Shipbuilding Corporation's company town (providing streets, sewers, sidewalks and other municipal services).

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16. This Court has not declared any function to be traditionally and exclusively reserved to the State since *Amalgamated Food Emp. Union Local 590 v. Logan Valley Plaza, Inc., supra,* in which the activities of a private shopping center were held to be state action. Significantly, this decision was limited in *Lloyd Corp., Limited v. Tanner,* 407 U.S. 551 (1972), and overruled in *Hudgens v. N.L.R.B.,* 424 U.S. 507 (1976).

17. This is not meant to suggest that the inquiry into "public function" is not a fact-oriented inquiry, or that the Court should disregard the context in which the "public function" claim arises. *See Burton v. Wilmington Parking Authority,* 365 U.S. at 722. However, the inquiry into the conduct of the purported state actor must be broad enough to reflect accurately the entity's "function" and not merely its conduct in the particular situation in question. *Id.*

Under these standards, application of the public function doctrine to the NCAA is unwarranted. The undisputed purpose of the NCAA is to establish, implement and enforce rules governing intercollegiate athletics.[18] "Neither the conduct nor the coordination of amateur sports has been a traditional government function." *San Francisco Arts & Athletics, Inc. v. United States Olympic*

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18. Section 1 of Article Two of the NCAA Constitution, entitled "Purposes", is set out in the 1976-77 NCAA Manual (J.A. 79-80), and provides:

> **Section 1. Purposes.** The purposes of this Association are:
>
> (a) To initiate, stimulate and improve intercollegate athletic programs for student-athletes and promote and develop educational leadership, physical fitness, sports participation as a recreational pursuit and athletic excellence.
>
> (b) To uphold the principle of institutional control of, and responsibility for, all intercollegiate sports in conformity with the Constitution and Bylaws of this Association.
>
> (c) To encourage its members to adopt eligibility rules to comply with satisfactory standards of scholarship, sportsmanship and amateurism.
>
> (d) To formulate, copyright and publish rules of play governing intercollegiate sports.
>
> (e) To preserve intercollegiate athletic records.
>
> (f) To supervise the conduct of, and to establish eligibility standards for, regional and national athletic events under the auspices of this Association.
>
> (g) To cooperate with other amateur athletic organizations in promoting and conducting national and international athletic events.
>
> (h) To legislate, through Bylaws or by resolution of a Convention, upon any subject of general concern to the members in the administration of intercollegiate athletics.
>
> (i) To study in general all phases of competitive intercollegiate athletics and establish standards whereby the colleges and universities of the United States can maintain their athletic activities on a high level.

Committee, 55 U.S.L.W. at 5067. It certainly is not a function *exclusively* reserved to government.

The Nevada Supreme Court, however, found that the NCAA imposed "disciplinary sanctions upon a state university employee" (J.A. 52). Because it determined that the right to "discipline public employees is traditionally the exclusive prerogative of the state . . .," the court concluded that the NCAA was performing a public function (J.A. 51). This is an incorrect application of the "public function" standard.

First, the court erred by focusing on the ultimate outcome in a specific case (*i.e.*, Tarkanian's suspension) rather than the NCAA's overall functions and purposes. The NCAA's true function—regulation of intercollegiate athletics—is not a function traditionally and exclusively reserved to the states. *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 55 U.S.L.W. at 5067; *Arlosoroff v. National Collegiate Athletic Association, supra*, 746 F.2d at 1021; *Graham v. National Collegiate Athletic Association, supra*, 804 F.2d at 958. Regulation of amateur sports simply is not on a par with the more clearly "governmental" activities found in the *White Primary Cases, supra*, and *Marsh v. State of Alabama*.

Second, the NCAA does not make personnel decisions for state (or private) universities. Its activities are much more modest. It is a voluntary association of public and private colleges and universities that agree to set minimum standards for the conduct of intercollegiate athletic programs (J.A. 80) and for the enforcement of those rules of conduct (J.A. 97-110). Member-

ship in the organization is limited to four-year schools and related entities which agree to abide by those standards (J.A. 82). Member institutions must ensure that their coaches and student-athletes abide by these rules (J.A. 82).[19] Sanctions, when imposed, are directed to the member institution, not the individuals involved in the infractions (J.A. 103). The NCAA has no authority to compel a member to comply with its rules,[20] or to hire or fire a university employee.[21] It simply determines the conditions under which a member may continue to participate in full standing in NCAA activities. And like any association, it maintains the right to limit or deny membership privileges according to its charter and bylaws (J.A. 82-83).[22] The Association simply determined in this case the conditions under which UNLV could continue to participate in full standing in NCAA activities. While these conditions represented the Infractions Committee's best judgment as to the appropriate

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19. Tarkanian admitted that he knew and understood NCAA rules when he arrived at UNLV, that he was "the head man" responsible for insuring the intercollegiate basketball program was being operated in compliance with NCAA rules (Tr. XI 2830), and that one of his obligations to UNLV was to maintain his program in compliance with NCAA rules (Tr. VIII 1981).

20. The NCAA has no subpoena or arrest powers, or any other police powers traditionally granted to law enforcement authorities.

21. The suspension of respondent was accomplished by the President of UNLV following notice and a hearing before a University hearing officer (J.A. 69-70). The NCAA did not appear or participate in that hearing (J.A. 71).

22. As a private association without the power of government, the NCAA's only overriding leverage is the ability to impose penalties upon or deny membership to an institution that chooses not to operate its intercollegiate athletic program in accord with the Association's purposes and policies.

steps to be taken, it was not the Committee or the Association which acted to implement those conditions, nor did they have the power so to act.

A holding that the NCAA performed a public function simply because UNLV responded to its finding by suspending Tarkanian is inconsistent with this Court's stated reluctance to "extend the sovereign-function doctrine outside of its present carefully confined bounds." *Flagg Bros., Inc. v. Brooks*, 436 U.S. at 163. If the Nevada Supreme Court's analysis of the alleged constitutional violation is followed, then the same conclusion might be reached when a private credentialing agency, for instance, makes a judgment about a professional on the basis of which the state restricts his capacity to practice his profession. Such a result would ignore the admonition that the courts should "respect the limits of their own power as directed against state governments and private interests." *Lugar*, 457 U.S. at 936-37.

The Nevada Supreme Court's misapplication of the public function doctrine transforms it from a shield necessary to protect the individual in unusual cases into an intrusive sword for the judiciary. Where a private entity's characterization as a state actor is based only on the facts peculiar to the complainant, it is properly evaluated under the nexus theory rather than the public function test. But, as will be seen, the nexus theory provides no more support for the judgment below than does the public function test.

2. Tarkanian Has Failed To Show The Required Nexus Between The State And The NCAA's Action

Application of the "nexus" test clearly reveals that the NCAA was not a state actor. Since at least *Jackson v. Metropolitan Edison Co., supra,* this Court has required a close nexus between the state and the *challenged activity.*[23] Entanglements between the state and the private party are not relevant, except as they impact on the particular decision at issue. Even then, the private action is not ascribed to the state unless "it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the state." *Blum v. Yaretsky,* 457 U.S. at 1004; *Rendell-Baker v. Kohn,* 457 U.S. at 840. *See also Tulsa Professional Collection Services v. Pope,* 56 U.S.L.W. 4302, 4304 (U.S., April 19, 1988) (requiring "the overt, significant assistance of state officials.") Neither extensive government regulation, *Jackson v. Metropolitan Edison Co.,* 419 U.S. at 350, nor extensive financial subsidization, *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee,* 55 U.S.L.W. at 5067, of the private entity will necessarily convert its conduct to state action. State action will not be ascribed to private conduct unless the government has compelled the private decision.

One of the clearest demonstrations of nexus analysis is set forth in this Court's opinion in *Jackson v. Metro-*

23. "But the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Jackson v. Metropolitan Edison Co.,* 419 U.S. at 351. *See also Blum v. Yaretsky,* 457 U.S. at 1004.

politan Edison Co. The plaintiff brought suit under Section 1983 against a privately owned and operated utility for termination of her electrical service without notice and hearing. The utility was at least a partial monopoly,[24] and held a certificate of public convenience from the state. Under a provision of its general tariff, the utility had the right to discontinue service to any customer for nonpayment of bills.[25] The plaintiff sought damages and an injunction, urging that, under state law, she had an entitlement to reasonably continuous electrical service to her home.[26]

The plaintiff launched a vigorous attack on the utility's action because it was a monopoly, heavily regulated by the state, and because the state had "specifically authorized and approved" the termination practice. 419 U.S. at 354. All of these arguments were rejected by this Court. As an initial matter, the mere fact that a private entity is subject to state regulation, even extensive and detailed, does not convert its action into that of the state. The relevant inquiry must be whether there is a sufficiently close nexus between the state and the decision of the regulated entity to discontinue service such that the action of the latter may fairly be

24. Although the monopoly status of Metropolitan Edison was in doubt, this Court's analysis assumed that it was a monopoly, but held this fact was not determinative in considering whether termination of service is state action. *Jackson v. Metropolitan Edison Co.,* 419 U.S. at 351-52.

25. The tariff provided: "*Cause for discontinuance of service.* Company reserves the right to discontinue its service on reasonable notice and to remove its equipment in case of nonpayment of bill. . ." *Jackson v. Metropolitan Edison Co.,* 419 U.S. at 346 n.1.

26. Pa.Stat.Ann.,Tit. 66, § 1171 (1959) provided that: "Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities. . . Such service shall be reasonably continuous and without unreasonable interruptions or delay." *Jackson v. Metropolitan Edison Co.,* 419 U.S. at 348 n.2.

treated as that of the state itself. *Id.* at 350-51. Since the plaintiff could not show that the utility's alleged monopoly status and the state's detailed scrutiny of its rates compelled the utility's decision to terminate service to her, she failed to show the proper nexus.[27]

This Court also rejected the argument that the state had authorized or approved the termination of plaintiff's electrical service, noting that the initiative to act came from the utility, not the state. *Id.* at 357. Although the provision authorizing termination of service was included in the utility's tariff, the regulating agency had not specifically approved this provision or adopted it as its own. Thus, the petitioner could not show that the state intended either overtly or covertly to encourage the practice. The Court concluded that plaintiff's arguments taken together showed no more than that the utility was heavily regulated, enjoyed a partial monopoly, and that it elected to terminate service in a manner found permissible under state law. This was insufficient to connect the state with the action of the utility so as to make it attributable to the state. *Id.* at 358-59. For those reasons, the utility could not fairly be said to be a state actor, and the second test of *Lugar* was not met.

A more recent case further illustrates the Court's continued demand for an intimate nexus between the state and the challenged private activity. *Rendell-Baker v. Kohn, supra*, involved the discharge of several em-

27. In a number of cases, this Court has also rejected arguments that substantial (even total) state funding forms the requisite nexus. *See, e.g., Blum v. Yaretsky*, 457 U.S. at 1010-11; *Rendell-Baker v. Kohn*, 457 U.S. at 840-41; *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 55 U.S.L.W. at 5067. In none of these cases was the petitioner able to show that state funding contributed to the challenged conduct.

ployees at a private school for children with special needs. Most of the school's students were referred to it by state agencies, the school's educational programs were extensively regulated, and the school received over 90% of its funding from public sources. This Court held that these connections were insufficient to render the school's employment decisions state action.

First, the school's heavy dependence on public funds did not render it "fundamentally different from many private corporations whose business depends primarily on contracts to build roads, bridges, dams, ships, or submarines for the government," and whose activities do not thereby become state action. 457 U.S. at 840-41. Second, the state's regulation of the school's educational services was not dispositive where the state played almost no role in personnel matters and the specific decisions at issue clearly "were not compelled or even influenced by any state regulation." *Id.* at 841.[28] Finally, the state's relatively recent decision to take financial responsibility for the education of maladjusted students at selected private schools neither established that the school performed a traditionally exclusive state function nor created a "symbiotic relationship" of the type found in *Burton v. Wilmington Parking Authority, supra*. *Id.* at 842-43. Accordingly, the Court did not find the required nexus between the state and the school's actions at issue.

Application of the principles set forth in *Rendell-Baker* and *Jackson* compels the conclusion that the requisite nexus between the state and the NCAA's actions in this case does not exist. Although the NCAA does consist of numerous public institutions, which supply at

28. The Court noted that one state agency, arguably acting beyond its authority, had opposed the firing. *Id.* at 838 n.6.

least some of its financial support, Tarkanian has neither contended nor shown that such membership or funding compelled the adoption of the rules regarding recruiting and extra benefits, or the Committee on Infractions' decision that he violated them. Indeed, it would be difficult to point to any state or group of states whose hand is felt in the NCAA. Nothing in its charter, bylaws or manual gives any state or group of states power to control the NCAA or its activities.

Nor is there any evidence of *de facto* control by any government. Decisions are made by majority (or greater) vote at annual conventions and in committee meetings (J.A. 86). Each member is entitled to only one vote (J.A. 85). No state has authority to compel members to vote in any certain way.

The bylaws and charter of the NCAA do not grant the Committee on Infractions or Council authority to hire and fire employees of member universities. No member institution has granted to the NCAA, by charter, contract or otherwise, the power to discipline its employees.[29] The Committee can only make findings that its rules have been violated by a member institution. It can impose sanctions only against the member (J.A. 103). The member institution retains the responsibility for administering and monitoring its athletic program, and for imposing sanctions upon its personnel when appropriate. But the member institution is not responsible for the Committee's findings and the conduct is not, therefore, "ascribable to the state." At most, the member institution might "react" to the Committee's decision or findings

29. Even if member universities did authorize the NCAA to discipline employees, the mere existence of this grant does not compel or substantially encourage the Committee's decision to discipline in a given case, as required by *Jackson v. Metropolitan Edison Co.* and *Blum v. Yaretsky*.

by taking some action against the perpetrators of the violation.

In this case, Tarkanian and other UNLV personnel were found by the NCAA Committee on Infractions to have violated several rules regarding recruiting and providing extra benefits to student-athletes.[30] The Committee ordered UNLV to show cause why Tarkanian should not be suspended from participation in the activities of the university's intercollegiate athletic program (J.A. 180-81). These findings were not made at the request of, or under the compulsion of, any state or government.[31] It was the Association whose rules were violated and it was the Association which took action to vindicate those rules. The decision to impose sanctions, as well as the content of those sanctions, was made by the NCAA's Committee on Infractions and Council. UNLV was the resisting, unwilling, and detrimental recipient of the sanctions, not their instigator (J.A. 69-70, 71-76). At most, the University "reacted" to the Committee's decision by independently deciding to suspend Tarkanian. This reaction, however, does not establish a nexus between the state and the previous decision of the NCAA. *See Blum v. Yaretsky*, 457 U.S. at 1005.

Blum v. Yaretsky and *Rendell-Baker v. Kohn* exemplify the general principle that a regulatory and funding relationship between governmental and non-governmental entities does not necessarily impose constitutional restraints on the non-governmental entity. Only where the government regulation or subsidy compels the action taken does the requisite "nexus" occur.

30. *See* n.12 *supra*.

31. Tarkanian has never maintained otherwise. Rather, he has steadfastly maintained that the deprivation of which he complains resulted from action taken by the NCAA.

In sum, the NCAA's supervision of intercollegiate athletics neither occurs under a rule imposed or privilege granted by the state nor is it sufficiently connected with the state to render the NCAA a state actor. For both of these reasons, the NCAA does not engage in state action, and therefore Tarkanian's challenge under the Fourteenth Amendment to the NCAA's actions concerning UNLV should have been dismissed.

CONCLUSION

The Nevada Court enjoined the enforcement by UNLV and the NCAA of the penalties imposed upon UNLV with respect to Tarkanian pursuant to the Committee on Infractions' Confidential Report No. 123(47) (J.A. 122-205). For the reasons stated above, the court was in error. Its judgment should be reversed, and the injunctions should be dissolved. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 180 (1972).

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Supreme Court of the United States

October Term, 1987

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,

Petitioner,

vs.

JERRY TARKANIAN,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Nevada

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QUESTION PRESENTED

Is the National Collegiate Athletic Association ("NCAA") a state actor, where the NCAA is a joint participant in a state university's suspension of a state employee because (I) the NCAA enforces its determination that the state employee be severed from intercollegiate athletics solely through the state university; (II) the state university has delegated its power and authority over the state employee to the NCAA and is contractually obligated to suspend the state employee at the direction of the NCAA; and (III) the NCAA requires that the state university suspend the state employee to avoid additional NCAA penalties against the university which may preclude it from participating in intercollegiate athletics?

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STATEMENT OF THE CASE

The Relationship of the Parties

The University of Nevada, Las Vegas ("UNLV") is a branch of the University of Nevada, a public institution of higher learning organized and existing under Article II, Section 4 of the Nevada State Constitution and laws and rules and regulations adopted pursuant thereto, and financed by the State of Nevada. ROA VI, 1475.[1] UNLV is, and at all times relevant to this action has been, a member of the National Collegiate Athletic Association ("NCAA"). Ex. 16, pg. 197.

Jerry Tarkanian is, and since July 1, 1977 has been, a tenured professional employee of UNLV with a continuing appointment as "Head Basketball Coach and Prof. of Physical Education." Ex. 1. Upon his initial appointment in 1973, the President of UNLV assured him in writing he would be offered a series of one-year contracts until he received tenure. ROA VIII, 2002-2003. Tarkanian's only services for UNLV since his initial appointment have been as men's Head Basketball Coach, a position he has held for over 30 consecutive years at various schools and colleges. ROA VIII, 1870. Tarkanian's employment agreement with UNLV provided that, if for any reason he did not continue his duties as men's Head Basketball Coach, he could remain employed at UNLV, but his yearly salary would revert to a base sum approximately

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[1] References to material in the Joint Appendix are cited herein as "J.A. [page]." References to the Record on Appeal before the Nevada Supreme Court are cited as "ROA [volume], [page]." References to trial Exhibits are cited as "Ex. [number]." A list of the exhibits cited, and the volume and page of the trial transcript (contained in the Record on Appeal) where each exhibit was offered and admitted, is attached as an Addendum to this brief. References to documents filed in the Nevada Supreme Court and thus part of the appellate record are cited herein as "NSCR [volume], [page]." References to the Brief for the Petitioner in this Court are cited as "P. Br. [page]."

$72,000 less than his salary as men's Head Basketball Coach. Ex. 24, pp. 2-3; ROA VIII, 1876-1879, 2007-2008.[2]

The NCAA is an unincorporated association including virtually all public and private four-year colleges and universities with major intercollegiate athletic programs from every state, the District of Columbia, and Puerto Rico. Ex. 16, pp. 148-194; ROA VIII, 1896-1897; XI, 2736, 2852-2853. A college or university must be a member of the NCAA to be involved in major intercollegiate athletics in the United States; as one prominent NCAA official expressed it, the NCAA is the "only game in town." ROA X, 2736. Thus, suspension or termination of UNLV's membership in the NCAA would end UNLV's intercollegiate athletic program because UNLV has to be a member of the NCAA to be involved in major intercollegiate athletics. ROA X, 2736.

By virtue of its membership, UNLV entered into a contractual arrangement with the NCAA, under which UNLV agreed to administer its athletic programs in accordance with NCAA "legislation," which includes the NCAA Constitution and Bylaws, official interpretations thereof, executive regulations, recommended policies and enforcement procedures. J.A. 82.[3] As the NCAA has acknowledged in this case: "The

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[2] In addition to his UNLV appointment, but contingent upon his continuing as men's Head Basketball Coach, Tarkanian has been regularly engaged in, and compensated to perform, a variety of services related to intercollegiate basketball, including appearing weekly on a local television broadcast, writing a newspaper sports column, providing program commentary for radio broadcasts of UNLV basketball games, promoting an international line of sporting products, lecturing at basketball clinics throughout the United States, conducting summer basketball camps at UNLV for children, and performing in commercial advertisements for several Las Vegas business enterprises. ROA VII, 1870-1874, 1879, 2024-2025, 2030-2031, 2056-2057, 2059-2060; Ex. 23.

[3] All of this "legislation" is contained in an annual publication known as the NCAA Manual. ROA VIII, 1924; Ex. 16. Relevant excerpts from the 1976-77 NCAA Manual (Ex. 16) are contained in the Joint Appendix. J.A. 77-110.

University . . . is bound by contract . . . to abide by NCAA enforcement penalties . . . ." NCAA Brief of Amicus Curiae filed in the Nevada Supreme Court on or about March 3, 1978 ("NCAA Amicus Curiae Brief"), pg. 19; NSCR II, 538.

> One "Purpose" stated in the NCAA Constitution is:
>
> To uphold the principle of institutional control of, and responsibility for, all intercollegiate sports in conformity with the Constitution and Bylaws of this Association.

J.A. 79. Thus, a "Principle for the Conduct of Intercollegiate Athletics" stated in the NCAA Constitution is that:

> The control and responsibility for the conduct of intercollegiate athletics shall be exercised by the institution itself . . . .

J.A. 80-81.

However, a "Fundamental Policy" specified in the NCAA Constitution is that:

> Legislation governing the conduct of intercollegiate athletic programs of member institutions shall apply to basic athletic issues such as admissions, financial aid, eligibility and recruiting; *member institutions shall be obligated to apply and enforce this legislation, and the enforcement programs of the Association shall be applied to an institution when it fails to fulfill this obligation.*

J.A. 80 (emphasis added). Consequently, the NCAA's "Official Procedure Governing the NCAA Enforcement Program (hereafter "NCAA Enforcement Program") provides that:

> All representatives of educational institutions are expected to cooperate fully with the NCAA investigative staff, Committee on Infractions and Council to further the objectives of the Association and its enforcement program. *The enforcement procedures are an essential part of the intercollegiate athletic program of each member institution* and require full and complete disclosure by all institutional representatives of any relevant information requested by the NCAA investigative staff, Committee on Infractions or Council during the course of an inquiry.

J.A. 97 (emphasis added).[4]

Thus, by becoming a member of the NCAA, UNLV made the NCAA's standards and procedures for disciplining state employees its own, and accepted the NCAA's investigation, determination, and disposition of alleged violations of NCAA legislation by UNLV employees and others in place of its own resolution of these issues. ROA X, 2587, 2592, 2631.

Among the penalties the NCAA may assess against a member institution violating NCAA legislation is an order requiring the institution to show cause why additional penalties – including suspension or termination of its NCAA membership – should not be imposed if, in the opinion of the NCAA Committee on Infractions or the NCAA Council, the institution does not take "appropriate disciplinary or corrective action" against persons connected with intercollegiate athletics. J.A. 104-105; ROA X, 2603. The NCAA Enforcement Program provides that:

> The nature and extent of such action shall be the determination of the institution after due notice and hearing to the individuals concerned, but the determination of whether or not the action is appropriate in the fulfillment of NCAA policies and principles, and its resulting effect

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[4] The NCAA delegates primary responsibility for administering its enforcement program to the NCAA Committee on Infractions. J.A. 97-110. At all times material to this case, the Committee on Infractions consisted of one representative from each of the following five member institutions, four of which are state institutions: University of Northern Colorado, University of Texas, University of Washington, Wake Forest University, and the University of Kentucky. ROA VII, 1918, 1923, 2779. If a member institution is dissatisfied with a decision of the Committee on Infractions, it may appeal to the NCAA Council. J.A. 101. The NCAA Council is the governing body of the NCAA between its annual conventions; among other things, the NCAA Council appoints the members of the Committee on Infractions and hears appeals from that body. ROA VIII, 1921-1922. At all times material to this case, the NCAA Council consisted of representatives from sixteen member institutions, eleven of which are public institutions, plus the NCAA President and Secretary-Treasurer as ex-officio members. See Ex. 16, pp. 130-131, listing the sixteen members of the council.

> on any institutional penalty, shall be solely that of the Committee (or Council).

J.A. 105.

Thus, in fact, the NCAA prescribes what disciplinary or corrective action the institution must take against the individual. J.A. 105; Ex. 17, pg. 10; ROA XI, 2850-2851. After giving the individual "due notice and hearing," the institution is required to execute the NCAA-mandated sanction against the individual, or thereafter persuade the NCAA that some good reason not to do so was developed at the institution's hearing that is wholly unrelated to the merits of the findings made and sanctions directed by the NCAA. ROA VIII, 1861; NCAA's Reply Brief on Cross-Appeal, filed in the Nevada Supreme Court on or about January 21, 1986, pp. 1-2 n.l; NSCR II, 444. The NCAA Enforcement Program specifies that: "Determinations of fact and violations arrived at . . . by the Committee, or by the Council on appeal, shall be final, binding and conclusive, and shall not be subject to further review by the Council or any other authority." J.A. 101.

The NCAA Proceedings Against UNLV

On February 25, 1976, the NCAA issued an "Official Inquiry" to UNLV, consisting of a cover letter and an enclosure listing numerous alleged violations of NCAA legislation from 1970 to February 1976, including allegations pertaining to the UNLV men's basketball program under Tarkanian, some of which named Tarkanian as being involved in the alleged violations. Ex. D; ROA VIII, 1988, 2142. The cover letter advised UNLV that:

> The enforcement program of the NCAA is a cooperative undertaking involving individual member institutions and allied conferences working together through the NCAA – a unified effort designed to improve the administration of intercollegiate athletics.

Ex. D. The letter asked the President of UNLV for his "cooperation and assistance to the end that complete information related to this matter may be developed," (Ex. D, pg. 3) and advised UNLV to fully investigate the allegations and submit an official response containing UNLV's position on each allegation and all data on which its position was based to the

Committee on Infractions and the NCAA investigative staff.[5] The letter stated the Committee would then meet to consider UNLV's response, UNLV representatives could appear before the Committee, and specifically requested that six UNLV employees appear, including Tarkanian. Ex. D.

UNLV enlisted its attorney, the Nevada Attorney General, to investigate all alleged violations, including those purportedly involving Tarkanian. ROA VIII, 2142-2143.[6]

After repeated inquiries by the Nevada Attorney General concerning the procedures UNLV was expected to follow (Ex. 2; ROA VIII, 2144, 2153-2156), the NCAA's Assistant Executive Director finally responded by letter dated June 2, 1976. Ex. 2, pp. 8-14. That letter informed UNLV that: (1) UNLV must seek out and submit to the NCAA prior to the Committee hearing all available information relating to the allegations, but the NCAA would not reveal to UNLV any information provided by individuals interviewed by the NCAA investigative staff prior to the hearing;[7] (2) UNLV and

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5 As noted, the NCAA Committee on Infractions and Council adjudicate NCAA allegations against member institutions. However, the Committee meets only six or seven times a year. ROA VIII, 1923, 2079. It has no office staff or files of its own. ROA VIII, 1969-1970; X, 2716. Thus, the Committee is dependent upon the NCAA investigative staff, which is composed of permanent employees of the NCAA administration under the supervision of the NCAA Executive Director. ROA VIII, 2033-2036, 2065. The staff arranges meetings; answers procedural questions; prepares minutes, reports and correspondence for the Committee on Infractions; reviews, investigates and develops information regarding alleged violations of NCAA legislation; and otherwise coordinates and processes infraction cases from beginning to end. ROA VII, 1964, 2064, 2087, 2121; IX, 2401-2404, 2443-2444; X, 2573-2575; XI, 2740-2741; Ex. 2; Ex. 16, pg. 117.

6 UNLV also retained private counsel to assist the Attorney General. ROA VIII, 2151-2152; IX, 2220, 2283.

7 The NCAA Bylaws, Article Seven, Section 5(c)(l), provide that "[a] member under investigation [s]hall be given notice of any specific charges against it, and the facts upon which such charges are based. . . ." J.A. 94. However, the NCAA Chairman of the Committee on Infractions,

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the Committee would be informed at the hearing as to the identity of the source of information upon which each allegation was based, and any details or evidence reported by persons interviewed by the NCAA staff;[8] (3) only individuals officially representing UNLV, not individuals representing only UNLV personnel, could be present at the hearing;[9] (4) only witnesses requested by the Committee could appear at the hearing, and the Committee would be reluctant to permit witnesses suggested by UNLV except under extremely unusual circumstances;[10] (5) UNLV's representatives could

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its Assistant Executive Director in charge of the Enforcement Division, and its chief staff investigator all testified that this was *not* done in this case despite UNLV's request that the NCAA do so. ROA XI, 2744, 2750; X, 2518-2519, 2668.

8 The NCAA Enforcement Program provides that: "The exact procedure to be followed in the conduct of the hearing will be determined by the Committee." J.A. 100. During the UNLV hearings, the NCAA Assistant Executive Director in charge of the Enforcement Division claimed that the NCAA investigators were acting in conformity with written policies and procedures of the Committee that were available to member institutions upon request. ROA IX, 2348-2349. However, efforts by UNLV over many months to obtain a copy of these procedures (Ex. 2, pg. 20; ROA IX, 2285-2289) were unsuccessful because these policies and procedures were buried within Committee minutes, being *ad hoc* Committee determinations made during prior investigations and hearings in other cases. ROA IX, 2289, 2476; X, 2506, 2683, 2688-2689; Ex. 2, pp. 23-24.

9 Five days before the hearing, UNLV received a letter from the NCAA reversing this position and allowing any current UNLV employee identified in an allegation to have legal counsel at the hearing. ROA VIII, 1896; X, 2682. By that time, however, Tarkanian's private counsel had made other commitments based on the NCAA's original position; consequently, Tarkanian was forced to appear during the first day of the Committee hearing without counsel. ROA VIII, 1896, 1898; Ex. 19.

10 The NCAA Bylaws, Article Seven, Section 5(c)(2), provide that "[a] member under investigation . . . [s]hall be given an opportunity to

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"debate" information presented at the hearing, but the hearing was institutional in nature in that the Committee would determine whether UNLV had violated NCAA legislation and if so, the action to be taken against UNLV;[11] (6) no transcript of the hearing would be made, only a tape recording, and UNLV representatives could listen to the tape recording but not make a verbatim transcript thereof.[12] Ex. 2, pp. 8-14.

Finally, the NCAA Assistant Executive Director observed that, "the responsibility of the University is to objectively, rather than defensively, investigate the allegations to determine the facts, regardless of the results," and continued:

> The enforcement procedures of the NCAA are administrative rather than legal procedures. In accordance with these procedures, the University should not practice a defense in investigating the allegations and preparing a

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appear before the Committee on Infractions (or Council upon appeal) to answer such charges *by the production of evidence*." J.A. 94 (emphasis added).

[11] Despite this position, the NCAA has repeatedly relied upon the Committee hearings as satisfying its due process obligations to Tarkanian in this litigation. *See, e.g.*, NCAA Amicus Curiae Brief, pp. 26-31; NSCR II, 538; NCAA Answering Brief and Opening Brief on Cross Appeal filed in the Nevada Supreme Court on or about July 15, 1985 ("NCAA Answering Brief"), pp. 30-40; NSCR I, 36.

[12] Thus, UNLV's request to have a court reporter transcribe the Committee hearing was denied; a Deputy Nevada Attorney General and UNLV's private counsel travelled to NCAA headquarters in Kansas to listen to the tape recordings of the hearings made and administered solely by the NCAA staff. ROA VIII, 2092-2093; IX, 2306-2307; Ex. 2, pg. 12; Ex. 29. However, UNLV was not allowed to duplicate or transcribe the tape recordings, and NCAA staff baby-sat the Deputy Attorney General and UNLV's private counsel to insure they did not do so. ROA VIII, 2093; IX, 2307, 2354. The transcripts of the Committee hearings that now exist – Ex. 31(a), Ex. 31(b), and Ex. 31(c) – were prepared by NCAA staff and NCAA counsel in this case, for purposes of this litigation. ROA VIII, 2093-2095.

> response to the NCAA official inquiry. It should investigate in the most objective manner possible all allegations for purposes of determining the truth, regardless of the results or the implication to the institution in terms of subsequent real or imagined disciplinary action. The basis for this statement is that the NCAA membership in Convention assembled has adopted the Association's Constitution, Bylaws and Enforcement Procedures, placing upon themselves the responsibility of complying with and enforcing NCAA legislation.
>
> Accordingly, the 'burden of proof' is shared jointly by both the NCAA enforcement staff and the institution. It is not a prosecutor-defense legal proceeding; rather, it is a cooperative administrative effort which, when implemented, is designed to place the responsibility for determining the facts on the shoulders of both the institution and the enforcement staff in an effort to assist the Committee on Infractions in arriving at appropriate judgments. It is obvious that the member institution desires to comply with NCAA legislation when it voluntarily joins the Association and it therefore is inherent throughout the enforcement procedures that the institution make every effort to determine whether it is complying by objectively investigating any allegations which have been filed with it. In short, the institution must also assume the 'burden of proof.'

Ex. 2, pp. 13-14.

On October 27, 1976, UNLV submitted its official response to the NCAA. Ex. 2, pg. 19; ROA VIII, 2164; IX, 2175, 2295. That response included two file boxes containing affidavits, sworn statements or depositions, and documentary evidence supporting UNLV's denial of the allegations it denied. ROA VIII, 2103; XI, 2748; IX, 2333.[13] With respect

[13] Between February and October 1976, the Nevada Attorney General caused his Chief Deputy and another Deputy to devote substantially all of their time, as well as that of their entire investigative and secretarial staffs, to investigating the allegations contained in the NCAA Official Inquiry. ROA VIII, 2143-2144, 2148-2150. The same individuals continued to work full time until December 1976, and about a quarter of their

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to the allegations purporting to involve Tarkanian, absolutely no information came to the attention of the Nevada Attorney General or UNLV's private counsel indicating that Tarkanian had committed any violation. ROA VIII, 2170; IX, 2341-2343; Ex. 3. On the contrary, all the evidence coming to the attention of the Attorney General and UNLV's private counsel indicated Tarkanian was completely innocent of all allegations. ROA VIII, 2170; IX 2343; Ex. 3.

UNLV's hearing before the Committee on Infractions took place on November 14, 1976 and December 13 and 14, 1976. Ex. 22, pp. 3-10. The NCAA investigative staff's presentation on each allegation involving Tarkanian consisted solely of having one of three NCAA staff investigators orally relate his recollection of conversations he (or some other staff investigator no longer with the NCAA) purportedly had with other individuals concerning their knowledge of facts or hearsay relating to the alleged violations. ROA VIII, 2089, 2167; IX, 2480; Ex. 3; Ex. 31(a); Ex. 31(b). The NCAA staff investigators were not sworn, and they presented no statements, affidavits or depositions from any of the individuals they purportedly interviewed, nor did they present any documentary or physical evidence of any kind. ROA VIII, 2089-2090.[14]

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time thereafter until August 1977, on the same subject. ROA VIII, 2148-2150. UNLV's private counsel spent approximately 1000 hours investigating the alleged violations and representing UNLV before the Committee on Infractions and Council. ROA IX, 2283.

[14] Apart from UNLV's official response, the only items before these investigators during their presentations were memoranda prepared by them (or by former investigators) concerning their interviews with the purported sources of information for the allegations. ROA VIII, 2090. These memoranda were dictated subsequent to the interviews, sometimes without the benefit of any notes. ROA VIII, 2090-2091. Where notes had been made, they were destroyed prior to the hearing. ROA VIII, 2101. The purported interviewees never had an opportunity to see the memoranda or review the information contained therein for accuracy. ROA VIII, 2101-2102. Neither UNLV, its legal counsel, Tarkanian, or his legal

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At the hearing, UNLV presented the sworn statements of the persons identified in the allegations involving Tarkanian; the NCAA investigators then reported that they had spoken previously with the same persons, and that those persons had given them contrary information. ROA IX, 2211. Thus, as the Chairman of the NCAA Committee on Infractions observed, with respect to the allegations charging violations by Tarkanian, in every material instance the information presented by way of the hearsay recollections of the NCAA investigators to support the allegations was in direct conflict with the sworn affidavits, statements and depositions obtained by the Nevada Attorney General's Office from the same sources. ROA XI, 2751-2752.[15]

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counsel were ever allowed to see or obtain copies of these memoranda despite repeated requests to do so prior to and at the hearing. ROA VIII, 2091-2167; Ex. 2, pp. 4, 19.

[15] At the hearing, the NCAA investigators selectively presented purported information in support of the allegations, while failing to relate information contrary to the allegations that had come to their attention until questioned by UNLV. ROA IX, 2298-2299; Ex. 2, pp. 13-14. After the December sessions, UNLV obtained additional information clearly demonstrating that NCAA investigators had provided false and misleading information to the Committee on central issues relating to allegations against Tarkanian. ROA IX, 2302, 2311-2312, 2321-2322. This information included a tape recording made by an interviewee of his interview with an NCAA investigator. ROA VIII, 2312; Ex. 3, pp. 31-34; Ex. 26; ROA IX, 2276. The recording unequivocally demonstrated that at the hearing, a NCAA investigator attempted to discredit the sworn statements obtained by UNLV and the objectivity of its investigation by falsely attributing to the interviewee statements he had not made. ROA X, pp. 2544-2552, 2562; Ex. 26, Ex. 28. UNLV then asked that the Committee conduct a special hearing at which UNLV could question the NCAA staff on these issues. ROA IX, 2302-2303, 2311-2312, 2318-2322; Ex. 14. At that hearing, held on March 13, 1977, the NCAA investigators claimed they had the right to misrepresent the true facts concerning their sources of information because of an unwritten and/or unpublished Committee policy regarding confidential sources. ROA IX, 2323; Ex. 31(c), pp.

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The NCAA refused to allow either UNLV or Tarkanian to present as witnesses anyone not then officially representing UNLV. Ex. 2, pg. 10; ROA VIII, 1934, 2164. Thus, the NCAA prohibited UNLV from producing at the hearing the persons supposedly making these conflicting statements to resolve the conflict between the NCAA investigators' hearsay recollections and the persons' own sworn statements. The Committee did not invite these interviewees to appear because it "would cost too much," and without any apparent reason, the Committee never attempted to resolve conflicting information attributed to the same person by calling him or her by telephone. ROA VIII, 1939.

As a result of this "cooperative undertaking," this "unified effort," this supposedly non-adversarial investigation by the NCAA and the Nevada Attorney General's Office, the allegations against UNLV involving Tarkanian were supported by nothing more than the unsubstantiated hearsay recollections of three NCAA investigators, while the evidence against these allegations consisted of sworn affidavits, statements, depositions and documentary evidence from the principals involved and others wholly controverting the charges. See Ex. 3. Nevertheless, the NCAA Committee on Infractions found against UNLV on 38 allegations, 10 of which involved Tarkanian, including two charging him with dishonest, immoral or illegal conduct. J.A. 122-205.[16] Thus, the only

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50-54, 57, 67. The Committee sustained this position. Ex. 31(c), pp. 50-54, 56, 59. When Tarkanian's counsel attempted to question the NCAA staff about these issues, staff asserted a claim of confidentiality, and the Committee upheld this claim and prevented further questioning on the very lines of inquiry for which the hearing had been granted. ROA IX, 2326-2327, 2330. The Committee made no investigation of its own into these matters. ROA XI, 2764-2765, 2767.

[16] Another well-known and still-active collegiate coach, admitting he was afraid to oppose the NCAA, testified below and before a Congressional subcommittee that one NCAA investigator admitted the NCAA was going to get Tarkanian and drive him out of coaching. Ex. 27; ROA VIII, 1900-1901; IX, 2234-2235, 2242-2243, 2245, 2253; XI, 2705. The trial

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substantive basis for any disciplinary action against Tarkanian was the unsubstantiated statements of three NCAA investigators accepted and adopted by the NCAA Committee on Infractions without any supporting evidence whatsoever.

The NCAA staff then drafted a so-called "Confidential Report," setting forth findings for each allegation, and penalties to be imposed upon UNLV and Tarkanian. Ex. 17; ROA VIII, 2121, 2123; IX, 2481, 2491; X, 2523-2525, 2529. The penalties against UNLV included two years' probation, during which its basketball team could not participate in post-season championships or appear on television. J.A. 178-179. The Committee requested UNLV to show cause why additional penalties should not be imposed upon UNLV if it did not "take appropriate disciplinary and corrective action with regard to" certain individuals, including:

> Head basketball coach Jerry Tarkanian which, in the Committee's present view, should be complete severance of any and all relations Tarkanian may have, formally or informally, with the University's intercollegiate athletic program during the period of the University's probation including, but not limited to, activities associated with administration, supervision, coaching, recruiting, athletic

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court found that a second NCAA investigator "entertained actual bias and prejudice against" Tarkanian. J.A. 20. However, the members of the Committee on Infractions having previously developed great trust and confidence in the NCAA staff members, afforded great weight to their presentations at the UNLV hearings as a result, and two Committee members testified this confidence was a determinative reason why findings were made against UNLV and Tarkanian despite sworn statements directly conflicting with the investigators' statements. ROA VIII 1949, 1951, 1952, 1954-1956; XI, 2756-2757, 2785-2786, 2791, 2797, 2798, 2800. In addition, at least one NCAA Committee member frankly admitted he had made up his mind against UNLV before any hearings took place because of UNLV's attacks upon the NCAA staff. ROA XI, 2785-2786, 2799-2800. Consequently, as the trial judge concluded: "This case presents a classic example of how misperception becomes suspicion, which in turn becomes hostility, which leads, inevitably to a deprivation of one's rights." J.A. 28.

booster groups and public relations or fund-raising activities related to the University's athletic program.

J.A. 180-181.

Under NCAA Bylaw 4-6-(d)(2), no other NCAA member could enter its team in a NCAA-sponsored event or tournament if it hired Tarkanian to coach its team during his two-year severance from the UNLV athletic program. Ex. 16, pg. 61. Furthermore, Policy 6, Section 4 of the NCAA "Recommended Policies and Practices for Intercollegiate Athletics" provides that:

> Prior to a person's possible employment as a member of the department of intercollegiate athletics, a member institution should give careful consideration to whether he previously has been involved in violations of NCAA legislation.

Ex. 16, pg. 113. Thus, the Committee's actions created a permanent as well as a temporary impediment to Tarkanian gaining employment in intercollegiate athletics.[17]

UNLV appealed certain findings and penalties, including all findings and penalties involving Tarkanian, to the NCAA Council. Ex. 22, pg. 14; ROA IX, pp. 2352, 2496. The Council did not have before it either a transcript or a tape recording of the Committee hearings, or any evidentiary documents or witnesses, except with respect to one allegation as to which another principal named therein had submitted affidavits and other documents controverting the allegation. ROA VIII, 2129; X, 2608-2610. However, the NCAA staff prepared and submitted to the Council its expanded Confidential Report No. 123 (47), adding commentary to each finding and the proposed penalties. J.A. 122-204. The NCAA staff informed UNLV and counsel for Tarkanian that Tarkanian and

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[17] Prior to a NCAA news release publicizing the NCAA's findings, Tarkanian had received and accepted offers to conduct (for compensation) several basketball coaching clinics in Colorado, New Mexico, Missouri and California, as a result of his success as UNLV's head basketball coach. Ex. 11; Ex. [illegible]; ROA VIII, 1872, 1880, 1893. As a direct result of the NCAA's action against Tarkanian and UNLV and the publicity attendant thereto, all such agreements were cancelled by the sponsors thereof. Ex. 12, Ex. 21; ROA VIII, 1881-1883, 1894.

his personal counsel would be permitted to appear and make a presentation to the Council. Ex. 22, pg. 15; Ex. 2, pg. 25.

UNLV submitted a Memorandum restating each appealed infraction and summarizing the NCAA staff's "evidence" on the left and UNLV's contrary evidence on the right. Ex. 3; ROA IX, 2333. This Memorandum concluded by saying, in part:

> The University believes that the imposition of a two-year suspension of head basketball coach Jerry Tarkanian, in light of the content, quality and weight of evidence presented, would constitute irresponsible and arbitrary action by the University.
>
> * * *
>
> . . . [A]fter four years of intensive investigation of the basketball program under Tarkanian, the enforcement staff was not able to present a single piece of documented evidence to support their allegations.

Ex. 3, pg. 42.

UNLV's appeal was heard by the Council on August 22, 1977. Ex. 22, pg. 15. After presentations had been made, UNLV representatives and NCAA Committee and staff representatives left to allow deliberations to begin. ROA VIII, 1899-1900, 2047. During deliberations, the Council recalled the three NCAA investigators for questioning because of the serious concerns of a number of Council members about the staff's investigation. ROA VIII, 2129-2131; X, 2594-2595, 2618-2619; XI, 2851-2852, 2854-2856. This session occurred without notice to, the knowledge or presence of, or participation by UNLV, Tarkanian, or their counsel. ROA VIII, 2130; X, 2618; XI, 2851-2852. Unlike the presentation session, not even a tape recording of this so-called "deliberation" session was made. ROA VIII, 2131; XI, 2848.

The Council affirmed the Committee's findings and penalties *en masse*. Ex. 22, pg. 17.

UNLV Proceedings Against Tarkanian

The NCAA's Confidential Report advised UNLV that:

> When such penalties and corrective actions as are determined by the Council become effective, the University should take every precaution to insure that the terms of the penalties and corrective actions are observed. Further, the Committee on Infractions intends to monitor the penalties and corrective actions during their effective periods, and any action contrary to their terms shall be considered grounds for extending their provisions and the University's probationary period.

J.A. 183. However, the Confidential Report also directed UNLV's attention to that portion of the 1976-77 NCAA Manual obligating the institution to provide "due notice and hearing" to an individual before taking any disciplinary or corrective action against him. J.A. 182.

Consequently, on September 6, 1977, pursuant to written notice, UNLV conducted a hearing to determine "appropriate disciplinary or corrective action" to be taken against Tarkanian as required by the NCAA. Ex. 3; Ex. 8; ROA IX, 2377; XI, 2941. The NCAA has expressly recognized that:

> The hearing granted plaintiff [Tarkanian] by the University [UNLV] was in fact the hearing required by the . . . NCAA Enforcement Procedure. . . . The hearing afforded plaintiff by the University must therefore be viewed as a part of the entire NCAA proceedings of which it was a part, and not as a single, isolated proceeding between the University and its employee.

NCAA Amicus Curiae Brief, pp. 26-27; NSCR II, 538. Thus, the UNLV hearing was "conducted pursuant to and as a supplement to the . . . NCAA proceedings . . . ." *Id.*, pg. 33.

The sole presentation on behalf of UNLV at this hearing consisted of UNLV's counsel reading and questioning Tarkanian about the findings involving Tarkanian in the NCAA's Confidential Report. Ex. 8; ROA IX, 2377, 2382; XI, 2953. Thus, the NCAA has characterized the evidence against Tarkanian at the hearing as "vicarious" of that before the NCAA Committee on Infractions. NCAA Answering Brief, pg. 51; NSCR I, 36.

By memorandum dated September 6, 1977, the UNLV hearing officer presiding at this hearing presented his findings and recommendation to the President of UNLV. J.A. 71-76. The hearing officer found that "[t]he factual basis for the NCAA's charges and sanctions as they apply to Coach Tarkanian is clearly in doubt" (J.A. 72), but concluded that UNLV was contractually compelled to adopt and implement the findings and penalty specified in the NCAA Expanded Confidential Report:

> [UNLV's counsel] argues persuasively that by joining the NCAA we delegated to that organization the establishment of governing standards and their enforcement as well. We are allowed and encouraged to make our own investigations but this is in no way a substitute for the investigative functions of the NCAA itself. We must live by our commitments to the NCAA, its standards and its machinery. We must accept their findings of fact as in some way superior to our own and, if we do not like the way the NCAA works, our remedy is to work for reform within the organization. In this instance we could wish for standards and due process and evidence far superior to that which we have observed, but given the terms of our adherence to the NCAA we cannot substitute – biased as we must be – our own judgment on the credibility of witnesses for that of the infractions committee and the Council.

J.A. 74-75; ROA XI, 2950, 2955. The Hearing Officer then identified UNLV's alternatives as follows:

1. Reject the sanction requiring us to disassociate Coach Tarkanian from the athletic program and take the risk of still heavier sanctions, e.g., possible extra years of probation.
2. Recognize the University's delegation to the NCAA of the power to act as ultimate arbiter of these matters, thus reassigning Mr. Tarkanian from his present position – though tenured and without adequate notice – even while believing that the NCAA was wrong.
3. Pull out of the NCAA completely on the grounds that you will not execute what you hold to be their unjust judgments.

J.A. 76. The Hearing Officer recommended that the President of UNLV adopt the second alternative and "execute the proposed sanctions of the NCAA as they apply to Coach Tarkanian." J.A. 76.

By letter dated September 7, 1977, the President of UNLV notified Tarkanian of his acceptance of the Hearing Officer's recommendation, commenting that UNLV's "dilemma" was "well set out in the decision" and "it would be impossible for the University to show cause why additional penalty should not be imposed if the University fails to take the action dictated by the Committee, and the University is simply left without alternatives." J.A. 69. The NCAA-mandated suspension of Tarkanian was made effective September 9, 1977 at 5:00 P.M. J.A. 69-70. The NCAA has acknowledged that UNLV "acted under compulsion" in suspending Tarkanian, while claiming that "[i]f Tarkanian has any legitimate complaint, it is against the NCAA and not his University." NCAA Amicus Curiae Brief, pp. 32, 33; NSCR II, 538.

The Litigation

On September 8, 1977, Tarkanian filed suit against UNLV in the Eighth Judicial District Court of the State of Nevada seeking declaratory and injunctive relief against his suspension. ROA I, 1-20. UNLV answered, denying the material allegations of Tarkanian's complaint and asserting as an affirmative defense that UNLV was "a mere extension of the NCAA" and that as a result, Tarkanian had been afforded due process through not only the University's hearing, but also the prior NCAA proceedings. ROA I, 90-96. After trial, Judgment was entered declaring that Tarkanian's Fourteenth Amendment rights had been violated and enjoining UNLV and its representatives "and all persons in active concert or participation with them" from suspending Tarkanian or taking any other action against him based on the NCAA Confidential Report. ROA II, 339-340. UNLV appealed this Judgment to the Nevada Supreme Court. ROA II, 566.

The NCAA then filed what it styled an "amicus curiae" brief in the Nevada Supreme Court arguing that no actual controversy was presented and alternatively that the NCAA "was an indispensable party" because the injunction had "the effect of invalidating NCAA proceedings and preventing their enforcement." NCAA Amicus Curiae Brief, pg. 19; NSCR II, 538. The Nevada Supreme Court rejected the NCAA's no actual controversy argument, saying:

> In the instant case, it is clear that the purpose of the university's suspension of Tarkanian was to carry out the mandate of the NCAA, and not merely to create a cause of action for litigation. There is no evidence whatever to suggest that had the university prevailed it would then have reinstated Tarkanian, in defiance of what it had determined were its contractual obligations to the NCAA and in the face of prospective sanctions by the NCAA.

J.A. 9.

However, the Nevada Supreme Court reversed the Judgment on the grounds the NCAA was a necessary party on the question of suspending Tarkanian. The Court found that, "[a]s a member of the NCAA, UNLV contractually agrees to administer its athletic program in accordance with NCAA legislation." J.A. 3. The Court then concluded that allowing the litigation to proceed without the NCAA might impair the NCAA's ability to protect its interests, specifically its claim of "a contractual right to bind the university to enforce the NCAA's decision by sanctions it deems appropriate." J.A. 11-12. The Court cited "the factual background" of *Regents of University of Minnesota v. NCAA*, 560 F.2d 352 (8th Cir.), *cert. dism'd*, 434 U.S. 978 (1977), noting the NCAA's position there "that it could not 'permit an individual institution to retain either interpretive or enforcement authority' over NCAA legislation. *Id.* at 360." J.A. 12 (footnote omitted).[18]

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[18] In holding the NCAA to be a necessary party, the Nevada Supreme Court also found that:

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After remand, the NCAA was added as a party defendant. No damages were sought against the NCAA. Following trial, the District Court concluded that the actions of the NCAA as well as UNLV constituted state action, and that the NCAA and UNLV had deprived Tarkanian of procedural and substantive due process which would result in immediate and irreparable harm from the loss of both liberty and property interests if the suspension were not enjoined. J.A. 26-27. The District Court then permanently enjoined UNLV and its representatives, and any persons or entity acting in concert or participation with them, from suspending Tarkanian or enforcing any provisions of the Confidential Report, and enjoined the NCAA and any persons acting in concert with it from taking further proceedings against UNLV or compelling UNLV to comply with the Confidential Report, and ordered the NCAA to take no action against UNLV with respect to the Confidential Report. J.A. 33-35. Subsequently, the District Court also

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> In this case, the controversy presented involves the NCAA directly, and cannot be completely and justly determined in its absence. The NCAA initiated and controlled the proceedings against UNLV which led to Tarkanian's suspension. The NCAA made the factual findings upon which Tarkanian's suspension was based. To consider the case as if it involved solely the relationship of the university and Tarkanian, or begin with the university's notification to Tarkanian of its intent to hold a hearing regarding his proposed suspension, would require the plaintiff to forego constitutional claims to which he may well be entitled.
>
> . . . It is clear that the meaningful factual determinations in this case, as well as the decision as to the penalty to be imposed, had been made by the NCAA *before* Tarkanian was afforded a hearing by UNLV. A Court of equity, in particular, should not be foreclosed from recognizing this reality, and affording plaintiff the relief to which it may entitle him.

J.A. 13 (emphasis in original).

awarded Tarkanian his costs and attorneys fees pursuant to Nev. Rev. Stat. § 18.005 *et seq.* and 42 U.S.C. § 1988. J.A. 36-43.

The NCAA appealed to the Nevada Supreme Court; UNLV did not appeal. Thus the injunction prohibiting UNLV from suspending Tarkanian is final and not before this Court. The Nevada Supreme Court affirmed the trial court's conclusions with respect to state action, due process violations, and deprivation of liberty and property interests. J.A. 45-58. However, the Nevada Supreme Court reduced the attorneys fees awarded to Tarkanian by excluding fees for the phase of the litigation in which he sued only UNLV, on the ground he did not prevail in that phase, and striking fees not supported by the evidence. J.A. 58-60. The Court also limited the injunction so as "only to prohibit enforcement of the penalties imposed upon Tarkanian in Confidential Report No. 123(47) and UNLV's adoption of those penalties." J.A. 61.

The NCAA petitioned this Court for a Writ of Certiorari, claiming five questions were presented, the first being:

> 1. Whether the action of the NCAA in directing one of its members, a state university, to show cause why it should not temporarily suspend an employee from his duties relating to intercollegiate athletics for violating the Association's rules, constitutes state action, where the member university, in compliance with NCAA rules, suspends the coach from coaching.

NCAA's Petition for Writ of Certiorari to the Supreme Court of the State of Nevada, pg. I.

By order entered February 22, 1988, this Court granted the petition, limited to Question 1 presented by the petition. Thus, there is now no question that Tarkanian has been deprived of both procedural and substantive due process, that "the decision by NCAA was arbitrary and capricious, and the decision of UNLV was vicariously so," and that UNLV was properly enjoined from suspending Tarkanian to prevent him from suffering immediate and irreparable harm from the loss of both liberty and property interests. J.A. 26-27. The only question here is whether the NCAA is a state actor.

SUMMARY OF ARGUMENT

This Court has long recognized that the Fourteenth Amendment establishes equal protection and due process requirements that only protect individuals against "such action as may fairly be said to be that of the States," not "merely private conduct, however discriminatory or wrongful." *Blum v. Yaretsky*, 457 U.S. 991, 1003 (1982), quoting *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948). Contemporaneously, however, this Court has also recognized that, where private parties join with State officials or utilize the overt official involvement of the State to violate the Fourteenth Amendment rights of others, the private parties become state actors, subject to liability under 42 U.S.C. § 1983. *Dennis v. Sparks*, 449 U.S. 24, 27-29 (1980); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 152 (1970); *United States v. Price*, 383 U.S. 787, 794 and n.7 (1966). *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982); *Shelley v. Kraemer, supra.*

Here, there is no question there was state action – UNLV, a state university, not the NCAA, suspended Tarkanian. *See Commonwealth of Pa. v. Board of Directors*, 353 U.S. 230 (1957); NCAA Answering Brief, pg. 8; NSCR I, 36. However, from beginning to end, the NCAA has been a joint participant in the State's suspension of Tarkanian, utilizing (1) the overt official involvement of state officials, (2) the State's delegation of its power and authority over state employees to the NCAA, together with the State's contractual obligation to impose the NCAA's directives, and (3) the interdependence of the NCAA and the State in disciplining state employees connected with intercollegiate athletics, to deprive Tarkanian of liberty and property interests without due process of law.

First, the NCAA made itself a joint participant by making use of the overt official involvement of state officials to enforce its "private" determination that Tarkanian be suspended. *Lugar v. Edmondson Oil Co., Inc., supra; Dennis v.*

Sparks, supra; Shelley v. Kraemer, supra. The NCAA did not simply exercise purely private rights authorized by state law without the overt official involvement of state officials. *See Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149 (1978). Here, the involvement of state officials was not only significant, substantial and pervasive, it was *essential* to the NCAA enforcing its "private" directive that Tarkanian be suspended, since the NCAA enforces its directives only through its member institutions. *Compare, Tulsa Professional Collection Services v. Pope*, 108 S. Ct. 1340 (1988). And here, the decision being challenged is the State's decision to suspend Tarkanian; consequently, the issue here is the NCAA's joint participation in the State's action, not whether there is a sufficient "nexus" between the State and the action of a private party to make the private party's action state action, though such "nexus" does exist. *Compare, San Francisco Arts & Athletics v. Olympic Committee*, 107 S. Ct. 2971 (1987); *Blum v. Yaretsky*, 457 U.S. 991 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982); *Jackson v. Metropolitan Edison Company*, 419 U.S. 345 (1974); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).

Second, the NCAA was a joint participant in setting the standards and procedures and making the determinations imposed by the State in suspending Tarkanian. By contract, the State delegated a right, power or privilege that is traditionally the exclusive prerogative of the State – the power to determine disciplinary conditions for state employees – to the NCAA. *See Evans v. Newton*, 382 U.S. 296 (1966); *Smith v. Allwright*, 321 U.S. 649 (1944); *Nixon v. Condon*, 286 U.S. 73 (1932). The State then imposed the NCAA's "private" standards, procedures and determinations against Tarkanian, under the State's statutory and common law authority, power and responsibility for disciplining state employees, because of the State's contractual obligation to the NCAA to do so. *See Moose Lodge No. 107 v. Irvis, supra*, 407 U.S. at 177-179; *Terry v. Adams*, 345 U.S. 461 (1953). UNLV and the NCAA thereby became joint participants in the State's suspension of Tarkanian.

Finally, the NCAA was a joint participant in suspending Tarkanian because of the interdependence of the NCAA and the State on this question, creating a symbiotic relationship between them with respect to suspending Tarkanian. *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); *cf. San Francisco Arts & Athletics v. Olympic Committee, supra*, 107 S. Ct. at 2987, 2991-2993 (1987) (concurring and dissenting opinions). UNLV is wholly dependent upon the NCAA for its ability to engage in intercollegiate athletics; it must impose the NCAA's "private" directive that Tarkanian be suspended to avoid additional penalties against itself, including the risk of being prohibited from engaging in intercollegiate athletics. Conversely, the NCAA can enforce its directives against persons connected with intercollegiate athletics only through its member institutions; thus, the NCAA is wholly dependent upon UNLV to enforce its "private" directive that Tarkanian be suspended. This total interdependence on the question of suspending Tarkanian creates a symbiotic relationship making the NCAA a joint participant in state action. *Burton v. Wilmington Parking Authority, supra.*

For each of these reasons, separately as well as in combination, the NCAA is a state actor and thus properly subject to 42 U.S.C. § 1983 and 42 U.S.C. § 1988.

ARGUMENT

I. THE NCAA AND THE STATE WERE JOINT PARTICIPANTS IN SUSPENDING TARKANIAN BECAUSE THE NCAA UTILIZED STATE OFFICIALS TO ENFORCE ITS DETERMINATION THAT TARKANIAN BE SUSPENDED WITHOUT DUE PROCESS OF LAW.

In *Dennis v. Sparks, supra*, private parties made a corrupt agreement with a state court judge causing the judge to deprive the plaintiff of property without due process of law. This Court unanimously held that the private parties were subject to suit under 42 U.S.C. § 1983, observing (per Justice White) that:

> . . . to act 'under color of' state law for § 1983 purposes does not require that the defendant be an officer of the State. It is enough that he is a willful participant in joint action with the State or its agents. Private persons, jointly engaged with state officials in the challenged action, are acting 'under color' of law for purposes of § 1983 actions.

449 U.S. at 27-28. *See Lugar v. Edmondson Oil Co., supra; Shelley v. Kraemer, supra.*[19]

Thus, in *Lugar v. Edmondson Oil Co., Inc., supra*, this Court held that private parties had become state actors by utilizing state officials to obtain a prejudgment attachment allegedly depriving the debtor of property without due process of law, without even considering the motives of the private parties. In so holding, this Court distinguished its earlier decision in *Flagg Brothers Inc. v. Brooks*, 436 U.S. 149 (1978), where this Court had held that a private party's use of a state statutory scheme allowing the private party to sell stored goods at a private sale to satisfy a warehouseman's lien did not amount to state action. 457 U.S. at 938-939. The distinguishing factor is the presence or absence of the "overt official involvement" of the State in the enforcement of private rights. *Lugar*, 457 U.S. at 927 n.6; *Flagg Brothers*, 436 U.S. at 157.[20]

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[19] In *Lugar*, this Court reaffirmed its earlier holding in *Adickes v. S.H. Kress & Co., supra*, that a private party's joint participation with a state official in a Fourteenth Amendment violation constitutes both "state action" under the Fourteenth Amendment and action "under color of law" for 42 U.S.C. § 1983. 457 U.S. at 931. Specifically, this Court concluded that: "If the challenged conduct . . . constitutes state action as delimited by our prior decisions, then that conduct was also action under color of state law and will support a suit under § 1983." 457 U.S. at 935 (footnote omitted). The NCAA assumes this to be true. P. Br. 20 n.2.

[20] The NCAA centers its state action analysis upon the criteria enunciated in *Lugar*. P. Br. 17-18, 24-26, 33, 34. This is also one of the criteria employed by the Nevada Supreme Court in finding the NCAA to be a state actor (J.A. 50-52) and as demonstrated below, *Lugar* does support this result. However, *Lugar* is expressly limited to "the particular context

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As noted, *Lugar* is "limited to the particular context of prejudgment attachment." 457 U.S. at 939 n.21. However, the State enforcement of private rights principle it applies is at least as old as *Shelley v. Kraemer, supra* and as modern as *Tulsa Professional Collection Services, Inc. v. Pope, supra*.[21]

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of prejudgment attachment," 457 U.S. at 939 n.21, and as the cases cited in this brief demonstrate – and the cases decided with *Lugar* confirm – state action is *not* determined solely by the specific criteria enunciated in *Lugar*. For example, in *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), decided with *Lugar*, this Court characterized the "ultimate issue" as whether the challenged action was "fairly attributable to the State," citing *Lugar*, but decided that issue without reference to the specific criteria enunciated in *Lugar*, and noted that "the acts of a private party are fairly attributable to the state on certain occasions when the private party acted in concert with state actors." 457 U.S. at 838 n.6. Similarly, in *Blum v. Yaretsky*, 457 U.S. 991 (1982), also decided with *Lugar*, this Court viewed the question as whether a private party's "conduct has sufficiently received the imprimatur of the State so as to make it 'state' action for purposes of the Fourteenth Amendment", 457 U.S. at 1003, and again decided that question without reference to the specific criteria enunciated in *Lugar*, noting that such an "imprimatur" arises "when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains," 457 U.S. at 1004 (emphasis in original), such as "if the private entity has exercised powers that are 'traditionally the exclusive prerogative of the State.' " 457 U.S. at 1005, quoting *Jackson v. Metropolitan Edison Co., supra*, 419 U.S. at 353. All of these factors are present here.

[21] Curiously, the NCAA claims that *Shelley v. Kraemer, supra*, exemplifies "cases where a private party was the vehicle for carrying out a policy firmly associated with the state" because there "a racially restrictive covenant forbidding the transfer of a white homeowner's land to nonwhites was held to be an unconstitutional denial of equal protection." P. Br. 22. As to both assertions, the *opposite* is true. The Court held that private voluntary adherence to racially restrictive covenants is *not* prohibited by the Fourteenth Amendment; however, judicial enforcement of such covenants by state officials acting in their official capacities *is* prohibited state action. 334 U.S. at 13-20. *See Moose Lodge No. 107 v. Irvis, supra*, 407 U.S. at 172, 178-179.

The "overt official involvement" may be legislative, *Peterson v. City of Greenville, S.C.*, 373 U.S. 244 (1963), executive, *Lombard v. State of Louisiana*, 373 U.S. 267 (1963), administrative, *Robinson v. Florida*, 378 U.S. 153 (1964), or judicial, *Shelley v. Kraemer, supra*. It applies to economic deprivations without due process, *Tulsa Professional Collection Services, Inc. v. Pope, supra*; *Lugar v. Edmondson Oil Co., Inc., supra*, as well as to invidious discriminations denying equal protection, *Adickes v. S.H. Kress & Co., supra*; *Shelley v. Kraemer, supra*. It applies to "overt official involvement" that is facially neutral, *Lugar v. Edmondson Oil Co., Inc., supra; Reitman v. Mulkey*, 387 U.S. 369 (1967), as well as to involvement that is blatantly discriminatory or wrongful, *Dennis v. Sparks, supra; Peterson v. City of Greenville, S.C., supra*, and it applies whether the impetus for the wrongful conduct originates with the State, *Norwood v. Harrison*, 413 U.S. 455 (1973); *Griffin v. County Sch. Bd. of Prince Edward Co.*, 377 U.S. 218 (1964), or with the private party, *Dennis v. Sparks, supra*; *Griffin v. State of Maryland*, 378 U.S. 130 (1964).

Most recently, in *Tulsa Professional Collection Services v. Pope, supra*, this Court held that an executrix's use of a state nonclaim statute utilizing inadequate notice to deprive an estate creditor of due process would violate the Fourteenth Amendment. The Court (per Justice O'Connor) observed that:

> Private use of state sanctioned private remedies or procedures does not rise to the level of state action. *See, e.g., Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978). . . . But when private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found. *See, e.g., Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

108 S. Ct. at 1345. The Court then distinguished the nonclaim statute before it from a "self-executing" statute of limitations found not to give rise to state action implicating due process in *Texaco, Inc. v. Short*, 454 U.S. 516 (1982), on the ground that, under a "self-executing" statute, the State "has no role to play beyond enactment of the limitations period." 108 S. Ct. at 1345. Under the nonclaim statute however, there was

significant, substantial and pervasive state action because the probate court "is intimately involved throughout, and without that involvement the time bar is never activated." *Id.*[22]

Here, the State's involvement is not merely significant, substantial, and pervasive, it is *essential* to enforcement of the NCAA's determination and directive that Tarkanian be suspended. The NCAA admits it "did not and could not suspend Tarkanian" directly. P. Br. 18. Thus, the NCAA *must* utilize state officials to discipline state employees connected with intercollegiate athletics. That utilization makes the NCAA a joint participant in state action. *Tulsa Professional Collection Services v. Pope, supra*; *Lugar v. Edmondson Oil Co., Inc., supra*; *Dennis v. Sparks, supra*; *Shelley v. Kraemer, supra*.

Faced with this comprehensive, current and cogent body of law, the NCAA tries to ignore its impact entirely by a deft slight of hand. Instead of focusing upon the NCAA's joint participation with UNLV in suspending Tarkanian, the NCAA erroneously characterizes the decision below as based on "public function" and "nexus" standards. P. Br. 34.[23] The

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[22] Justice Rehnquist dissented in *Pope*, finding the probate court's involvement "trivial" and "entirely of an administrative nature." 108 S. Ct. at 1349. Thus he could not concur in a decision in which "[v]irtually meaningless state involvement, or lack of it, rather than the effect of the statute in question on the rights of the party whose claim is cut off, is held dispositive." *Id.* For him, to distinguish the statute from a "self-executing" statute not giving rise to state action should require "a judicial or other determination that *itself* extinguishes the claimant's rights." *Id.* (emphasis in original). Here, no such criticism can be made, since it is the involvement of the State itself in carrying out the NCAA's directive – UNLV's suspension of Tarkanian – that deprives Tarkanian of liberty and property interests without due process of law.

[23] The NCAA is simply wrong in thus characterizing the decision below. The Nevada Supreme Court begins its state action analysis by noting that early lower-court decisions had found that the NCAA engaged in state action because its member institutions "were either public or government supported." J.A. 48-49. The Court then disposes of the NCAA's argument that this Court's 1982 trilogy of decisions, Lugar,

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NCAA then attempts to summarily dispose of the entire joint participation doctrine in a single footnote, claiming that joint action is either the same as the Court's "nexus" analysis or was limited in *Lugar* to prejudgment attachment cases. P. Br. 34-35 n.14. However, *Lugar* only limits the Court's *holding* in that case to prejudgment attachment cases, 457 U.S. at 939 n.21, and Justice White's opinion for a unanimous Court in *Dennis v. Sparks, supra* – not referenced in his opinion for the Court in *Lugar* decided less than two years later – amply demonstrates that *Lugar* was not intended to limit the joint participation *doctrine* to prejudgment attachment cases.

On the contrary, the NCAA's assertion ignores entirely the vast body of law summarized above, in which this Court has implicitly or explicitly recognized state action resulting from the State's overt official involvement in enforcing private action. *See also, United States v. Price*, 383 U.S. 787,

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Rendell-Baker, and *Blum*, and subsequent lower-court decisions "require a different result," by discussing each of these decisions in detail and distinguishing the subsequent lower-court cases as involving private schools and/or not involving state employees. J.A. 49-52. Specifically, the Nevada Supreme Court notes that both *Blum* and *Rendell-Baker* recognize state action where a private entity exercises "powers that are 'traditionally the exclusive prerogative of the state,' " and that "the right to discipline public employees is traditionally the exclusive prerogative of the State." J.A. 51. The Nevada Supreme Court then concludes that the two-part test in *Lugar* is also satisfied. The first prong is satisfied because "no third party could impose disciplinary sanctions upon a state university employee unless the third party received the right or privilege from the university." J.A. 52. Consequently, the right or privilege *must* have come from the State, since it could have no other source. The second prong is satisfied because, "[b]y delegating authority to the NCAA over athletic personnel decisions and by imposing the NCAA sanctions against Tarkanian, UNLV acted jointly with the NCAA." J.A. 52. Thus, the Nevada Supreme Court's decision is based on the NCAA's exercise of a power that is traditionally the exclusive prerogative of the State and UNLV's joint action with the NCAA in suspending Tarkanian, *not* the NCAA's performance of a "public function" or any "nexus" between the State and the NCAA's actions against Tarkanian.

794 and n.7 (1966). And this joint participation doctrine centers upon the private party's joint participation with the State in the State's action that is being challenged; thus it differs fundamentally from this Court's "nexus" decisions in which it is the private party's action that is being challenged and the question is whether there is a sufficient "nexus" between the State and the private party's action to make the private party's action state action.[24]

Thus in *San Francisco Arts & Athletics*, *Blum*, *Rendell-Baker*, *Jackson*, and *Moose Lodge No. 107*, the plaintiffs challenged the actions of private parties, *not* the actions of the State, and the question was whether there was a sufficient "nexus" between the State and the "challenged action" to make the private party's action state action. *See Jackson v.*

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[24] However, the Court's "nexus" requirements are also satisfied in this case. The NCAA's actions against Tarkanian were taken by its Committee on Infractions, four of the five members of which were representatives of state universities and its Council, eleven of the sixteen members of which were representatives of public institutions. In *Lake Country Estates, Inc. v. Tahoe Reg. Plan.*, 440 U.S. 391 (1979), this Court recognized that actions taken by representatives of different states acting in concert still constitute actions taken under color of state law for purposes of the Fourteenth Amendment and 42 U.S.C. § 1983, even though private representatives are also involved, 440 U.S. at 401 n.20, and the entity through which the actions are taken is not entitled to Eleventh Amendment immunity. 440 U.S. at 399-402. Furthermore, given the NCAA's reliance on its member institutions to enforce its directives, there would be no reason for the NCAA to take action against Tarkanian if UNLV had not delegated its power to determine the conditions under which Tarkanian could be disciplined to the NCAA, as well as contractually agreed to enforce the NCAA's directives with respect to UNLV employees connected with intercollegiate athletics. This delegation of State power and contractual agreement to enforce the NCAA actions in question here create the requisite "nexus" between the State and the NCAA's actions against Tarkanian. *Compare Moose Lodge No. 107 v. Irvis*, *supra*, 407 U.S. at 177-179, and *Public Utilities Comm'n v. Pollak*, 343 U.S. 451 (1952), with *Blum v. Yaretsky*, *supra*, and *Jackson v. Metropolitan Edison Company*, *supra*.

Metropolitan Edison Company, *supra*, 419 U.S. at 351.[25] Here, there is no question there was state action – UNLV, not the NCAA, suspended Tarkanian. Thus here, one *starts* with state action and, given the NCAA's use of both the "overt official involvement" of State officials and the State's statutory and common-law power, authority and responsibility over State employees to enforce its "private" determination and directive that Tarkanian be suspended, there also is no real question that the NCAA was a joint participant in the state action suspending Tarkanian, and thus a state actor. *Lugar v. Edmondson Oil Co.*, *supra*; *Dennis v. Sparks*, *supra*; *Shelley v. Kraemer*, *supra*.

II. THE NCAA AND THE STATE WERE JOINT PARTICIPANTS IN SUSPENDING TARKANIAN BECAUSE THE STATE DELEGATED ITS POWER TO DETERMINE DISCIPLINARY CONDITIONS FOR STATE EMPLOYEES TO THE NCAA, AND THE STATE WAS CONTRACTUALLY OBLIGATED TO IMPOSE THE NCAA'S DETERMINATION THAT TARKANIAN BE SUSPENDED WITHOUT DUE PROCESS OF LAW.

As the NCAA notes, "this Court originally applied constitutional restraints to government actors only." P. Br. 21. However, over one hundred years ago, in *The Civil Rights Cases*, 109 U.S. 3 (1883), this Court recognized that state

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[25] Notably, however, in *Jackson* this Court observed that: "We have, of course, found state action present in the exercise by a private entity of powers traditionally exclusively reserved to the State. [Citations, including *Nixon v. Condon*, *supra*; *Terry v. Adams*, *supra*; and *Evans v. Newton*, *supra*.] If we were dealing with the exercise by Metropolitan of some power delegated to it by the State which is traditionally associated with sovereignty, such as eminent domain, our case would be quite a different one." 419 U.S. at 352-353. Here, as demonstrated in the next section of this Argument, we are dealing with a power that is traditionally the exclusive prerogative of the State – the power to determine disciplinary conditions for State employees – which the State has delegated to the NCAA by contract.

action extends beyond state actors to acts "done under state authority." 109 U.S. at 17.[26] Thus, in subsequent cases, this Court has not hesitated to extend state action to private parties exercising state authority, i.e., what have come to be called "powers that are 'traditionally the exclusive prerogative of the State.'" *Blum v. Yaretsky*, *supra*, 457 U.S. at 1005.[27]

For example, in *Evans v. Newton*, *supra*, a city resigned as trustee of a park that had been devised to the city in trust

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[26] Four years earlier, in *Ex Parte State of Virginia*, 100 U.S. 339 (1879) this Court had emphasized that the prohibitions of the Fourteenth Amendment apply to actions of the State, "by whatever instruments or in whatever modes that action may be taken." Thus, "no agency of the state, or of the officers or agents by whom its powers are exerted," may violate the Amendment; as such a person "acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it." 100 U.S. at 346-347.

[27] The Brief for the Petitioner confuses this question by referring to the "performance by a private party of vital and comprehensive governmental *functions*," P. Br. 21 (emphasis added), and thereafter referencing a "public function test." P. Br. 22, 35-41. *See Lugar v. Edmondson Oil Co., Inc.*, *supra*, 457 U.S. at 939. Performance of a "public function" can indeed constitute state action, *Marsh v. State of Alabama*, 326 U.S. 501 (1946); *cf. Rendell-Baker v. Kohn*, *supra*, 457 U.S. at 842, but that is a wholly *different* question than whether a private party exercises a *power* that is traditionally the exclusive prerogative of the State. Much of the confusion in this regard is attributable to overlapping but hardly identical meanings given to a continuum of terms, from a "governmental power," to a "governmental function," to a "public function," to a "function affected with a public interest." *See Jackson v. Metropolitan Edison Company*, *supra*, 419 U.S. at 352-354 (1974). The NCAA is a state actor because, *inter alia*, the NCAA exercises a power that is traditionally the exclusive prerogative of the state – the power to determine disciplinary conditions for state employees. Respondent does not rely on the NCAA's performance of a "public function" here.

under a private will requiring segregation, to allow private trustees to be appointed to maintain the park on a segregated basis. This Court recognized that:

> Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action. . . . That is to say, *when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations.*

382 U.S. at 299 (emphasis added). The Court then assumed *arguendo* that if a private party "in no way implicated the State in the supervision, control, or management" of a school or center, no constitutional question would be presented, but held that: "If the municipality remains entwined in the management or control of the park, it remains subject to the restraint of the Fourteenth Amendment . . . ". 382 U.S. at 300-301.[28]

Here, there can be no serious question that the power to hire, fire and suspend state employees from their duties is a power that is traditionally the exclusive prerogative of the State. See Nev. Rev. Stat. § 281.370(1); Nev. Rev. Stat.

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[28] In *Evans v. Newton*, *supra*, this Court also suggested that the park performed a public function. 382 U.S. at 301-302. However, in *Evans v. Abney*, 396 U.S. 435 (1970), this court rejected Fourteenth Amendment challenges to the state court's subsequent determination that, because the park could not be maintained on a segregated basis, the land reverted to the heirs of the testator. Since allowing such a reversion would be inconsistent with the park's performance of a public function giving rise to state action, this Court thereby demonstrated that its state action holding in *Evans v. Newton*, *supra*, rested not on performance of a public function, but on the private trustees' exercise of municipal powers over what was city property before the reversion. *See Flagg Bros., Inc. v. Brooks*, *supra*, 436 U.S. at 159 n.8 (1978).

§ 396.320(1).[29] *Board of Regents v. Oakley*, 97 Nev. 605, 637 P.2d ~~H~~99 (1981); *State v. Board of Regents*, 70 Nev. 144, 261 P.2d 515 (1953).

The NCAA Constitution reaffirms the principle of institutional control of, and responsibility for, intercollegiate athletics, but in the same breath mandates that such control and responsibility be exercised in conformity with the Constitution and Bylaws of the NCAA. J.A. 79. The NCAA Constitution then obligates member institutions to "apply and enforce" NCAA "legislation" under threat of imposing penalties upon the institution if it does not do so. J.A. 80. The NCAA Bylaws obligate member institutions to comply with the NCAA enforcement program, J.A. 93-94, and the NCAA Enforcement Program expressly provides that: "The enforcement procedures are an essential part of the intercollegiate athletic program of each member institution . . . ." J.A. 97. Furthermore, as the court below noted, the factual scenario in *Regents of University of Minnesota v. NCAA*, *supra*, confirms that the NCAA does not allow any individual institution to retain either interpretive or enforcement authority over NCAA legislation. 560 F.2d at 360; J.A. 12.

Thus, as to state employees connected with intercollegiate athletics, the NCAA requires that its standards, procedures and determinations *become* the State's standards,

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29 Nev. Rev. Stats. § 281.370(1) provides, and at all times material hereto has provided in substance, that: "All personnel actions taken by state, county or municipal departments, agencies, boards or appointing officers thereof must be based solely on merit and fitness." Nev. Rev. Stats. § 396.320(1) provides, and at all times material hereto has provided, that: "The willful neglect or failure on the part of any teacher, instructor, professor, president or chancellor in the University of Nevada System to observe and carry out the requirements of this chapter [Chapter 396, University of Nevada System, of the Nevada Revised Statutes] shall be sufficient cause for the dismissal or removal of such person from his position."

procedures and determinations for disciplining state employees. If a state university fails to accede to NCAA standards, procedures and determinations – regardless of the State's own factual determinations with respect to the state employee's conduct – the state university is subject to sanctions, including effectively barring it from participating in intercollegiate athletics. *See, e.g., Regents of University of Minnesota v. NCAA, supra.* Quite clearly, this relationship entails conduct on the part of the NCAA that goes far beyond mere advocacy by the NCAA. The State is *obligated* to impose NCAA standards, procedures and determinations making the NCAA a joint participant in the State's suspension of Tarkanian.[30]

The reach of the state action doctrine under these circumstances is well-illustrated by the so-called "White Primary Cases," culminating in *Terry v. Adams, supra.* In *Nixon v. Herndon*, 273 U.S. 536 (1927), this Court invalidated a Texas statute prohibiting blacks from participating in Democratic party primary elections. In *Nixon v. Condon, supra*, this Court then considered a subsequent Texas statute empowering the executive committee of each political party to determine those qualified to vote or otherwise participate in the party primary elections, and concluded that the statute had the effect of making the private party's executive committee an

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30 Thus, the NCAA's claim, citing *Lugar*, that it is not a state actor because Tarkanian's suspension was not "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible," 457 U.S. at 937, must fail. Tarkanian's suspension was "caused by the exercise of a right or privilege created by the State" because the State delegated to the NCAA its right and privilege to determine disciplinary conditions for state employees, and Tarkanian's suspension was caused "by a rule of conduct imposed by the State or by a person for whom the State is responsible," because the State suspended Tarkanian at the direction of the NCAA to fulfill the State's contractual obligations to the NCAA.

organ of the state and thereby subject to the Fourteenth Amendment. 286 U.S. at 84-85, 88-89. In *Smith v. Allwright*, *supra*, this Court then invalidated a resolution of the Texas Democratic party, limiting its membership and participation in its affairs to white citizens, recognizing that "state delegation to a party of the power to fix the qualifications of primary elections is delegation of a state function that may make the party's action the action of the state." 321 U.S. at 660, 663-665.[31]

Finally, in *Terry v. Adams*, *supra*, white Texas Democrats had formed the Jaybird Democratic Association, "a self-governing voluntary club." 345 U.S. at 463. The Association held "pre-primary elections" prior to the state primary elections; successful Jaybird candidates then entered the state Democratic primaries and "with few exceptions" ran and won without opposition in the primary and general elections. 345 U.S. at 463, 483. The Jaybird Association argued there, as the NCAA argues here, that it was a "mere private group." 345 U.S. at 466, 479. This Court (in multiple opinions) saw through the formal relationship, emphasizing that the Democratic primary and general elections were "no more than the perfunctory ratifiers of the choice that has already been made in Jaybird elections from which Negroes have been excluded." 345 U.S. at 469, *accord* 483-484. It was "immaterial that the state does not control that part of this elective process which it leaves for the Jaybirds to manage," because

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31 *Smith v. Allwright supra*, relies on the Court's decision in *United States v. Classic*, 313 U.S. 299 (1941) where, in discussing 18 U.S.C. § 242 (then 18 U.S.C. § 52) the criminal counterpart of 42 U.S.C. § 1983, this Court observed that: "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." 313 U.S. at 326.

the Jaybird primary had "become an integral part, indeed the only effective part, of the elective process that determines who shall rule and govern in the county." 345 U.S. at 469, *accord* 481-484.[32]

The so-called White Primary Cases establish that state delegation of statutory powers and responsibilities to private parties does not insulate those private parties from Constitutional requirements, including the Fourteenth Amendment, where the effect is a denial of constitutionally protected rights. *Terry v. Adams*, *supra*, is particularly instructive since it involved a two-tiered decision-making process such as advanced here by the NCAA as insulating the "private" party from Fourteenth Amendment requirements. Indeed, this case is significantly stronger than *Terry v. Adams*, *supra*, since there, the Democratic primary and general election results simply followed in fact the Jaybird Association election results; here, the state university is *obligated* by contract to apply and enforce the NCAA's decisions with respect to disciplining state employees.

The NCAA repeatedly relies on *Moose Lodge No. 107 v. Irvis*, *supra*. P. Br. 23, 28, 48. There, this Court refused to find state action based on the State's granting of a liquor

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32 In the White Primary Cases, the Texas Democratic party had argued that its rules and regulations merely determined the conditions of membership in a voluntary association. *See, e.g., Smith v. Allwright*, *supra*, 321 U.S. at 657. The NCAA makes the same argument here, claiming that it did no more than determine the conditions under which UNLV could be a member in good standing of the NCAA. P. Br. 18-19, 39-41. That argument must fail here for the same reason it failed in the White Primary Cases. At the NCAA's insistence, the State has delegated its power to determine disciplinary conditions for state employees to the NCAA; under *these* circumstances, the private entity is not simply determining the conditions of membership in a private association, the private entity is a joint participant in state action disciplining the state employee. *Terry v. Adams*, *supra*.

license to a private club practicing racial discrimination because, with one exception, the State's regulations did not "in any way foster or encourage racial discrimination," or "make the State in any realistic sense a partner or even a joint venturer in the club's enterprise." 407 U.S. at 171-177. However, in doing so, this Court (per Justice Rehnquist) observed that:

> Our cases make clear that the impetus for the forbidden discrimination need not originate with the State if it is state action that enforces privately originated discrimination. Shelley v. Kraemer, *supra*. . . . Our holdings indicate that where the impetus for the discrimination is private, the State must have 'significantly involved itself with invidious discriminations,' Reitman v. Mulkey, 387 U.S. 369, 380 . . . (1967), in order for the discriminatory action to fall within the ambit of the constitutional prohibition.

407 U.S. at 172-173.

This Court then considered a state regulation obligating the club licensee to adhere to all of the provisions of its constitution and bylaws, where the private club's constitution and bylaws discriminated on the basis of race. 407 U.S. at 177-179. The Court observed that:

> Even though the Liquor Control Board regulation in question is neutral in its terms, the result of its application in a case where the constitution and bylaws of a club required racial discrimination would be to invoke the sanctions of the State to enforce a concededly discriminatory private rule. . . . Shelley v. Kraemer, 334 U.S. 1 . . . (1948), makes it clear that the application of state sanctions to enforce such a rule would violate the Fourteenth Amendment.

407 U.S. at 178-179.

Here, the State has statutory and common law power and responsibility for disciplining state employees. However, by joining the NCAA, UNLV agreed to exercise that power and responsibility according to standards, procedures and determinations dictated by the NCAA. That contractual undertaking may be neutral on its face, but under the circumstances of

this case, it results in UNLV imposing upon Tarkanian the NCAA's standards, procedures and determinations depriving Tarkanian of his Fourteenth Amendment rights to due process of law. *Cf. Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768 (1952); *Steele v. Louisville & N.R. Co.*, 323 U.S. 192 (1944). Unquestionably, the State has "significantly involved itself" in the NCAA's deprivation of Tarkanian's Fourteenth Amendment rights by delegating its power to determine disciplinary conditions for state employees to the NCAA, making the NCAA's standards, procedures and determinations its own at the NCAA's insistence, and then imposing those standards, procedures and determinations upon a state employee because of its contractual obligation to the NCAA to do so. UNLV and the NCAA are thus joint participants in the state action suspending Tarkanian.[33]

The NCAA also relies on *Polk County v. Dodson*, 454 U.S. 312 (1981) holding that a public defender representing a criminal defendant does not act under color of state law, for

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[33] The NCAA relies on this court's comment in *Blum v. Yaretsky*, *supra*, that merely because "the State responds" to private actions "does not render it *responsible* for those actions." 457 U.S. at 1005 (emphasis in original). P. Br. 19, 28-30, 33, 41, 46-47. There, however, the plaintiffs did not challenge the State's "response," *only* the private parties' initial actions as impairing constitutional rights. *Id.* Here, the State's "response" is at issue, and that response is dictated by the NCAA. Furthermore, the State *must* so respond because of its preexisting contractual obligations to the NCAA. Indeed, the NCAA's action/reaction scenario is cogently refuted by the NCAA's 1978 "amicus curiae" brief filed in the court below, where the NCAA successfully argued that it was "an indispensable party" on the question of the State's right to suspend Tarkanian because of its contractual rights and because the lower court's injunction had "the effect of invalidating NCAA proceedings and preventing their enforcement." NCAA Amicus Curiae Brief, pg. 19; NSCR II, 538. Quite clearly, when it is in the NCAA's interest to do so, the NCAA freely abandons its present posture that it is only concerned with the conditions of UNLV's membership in the NCAA, not UNLV's reaction to NCAA directives, and vigorously advances the NCAA's joint participation in the State's suspension of Tarkanian as a legal right entitled to judicial protection.

the notion that challenged conduct emanating from private rules rather than state law is not state action. P. Br. 25-27. But in *Moose Lodge*, the challenged conduct similarly emanated from the club's "private" constitution and bylaws. Consequently, *Dodson* does not rest solely on the canons governing the public defender's conduct being from a supposedly private source; equally important was the unique fact that a public defender representing a criminal defendant acts *adverse* to the state, and thus could not be acting under color of state law. 454 U.S. at 318-320.[34] The NCAA can make no such claim of adversity here, and the Court expressly limited its holding in *Dodson*, deciding "only that a public defender does not act under color of state law when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding." 454 U.S. at 325 (footnote omitted).

Furthermore, *Dodson*, expressly recognizes that its holding does *not* mean that a public defender never acts under color of state law, citing *Branti v. Finkel*, 445 U.S. 507 (1980). 454 U.S. at 325-326. In *Branti* – as recognized in *Dodson* – this Court held that public defenders do so act in making hiring and firing decisions for the State, and that such decisions are subject to the First and Fourteenth Amendments. Here it is *not* Tarkanian's performance on the basketball court, but his suspension from his duties as a state employee that is at issue. Since the NCAA requires that the State delegate its power to determine disciplinary conditions for state employees to the NCAA, and then utilizes the State's power to discipline state employees in requiring that state employees like Tarkanian be suspended, the NCAA has made

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[34] In fact, the Court's comments with respect to public defenders being governed by the same standards as private attorneys were made in response to the argument that public defenders differ from private attorneys by being employed and paid by the State and thus having different loyalties to their clients. 454 U.S. at 321-324. These concerns simply are not present here.

itself a joint participant in the State's suspension of Tarkanian, regardless of whether or not the NCAA is a state actor in other contexts or for other purposes.

Thus, the NCAA's reliance on *Lugar* in arguing it is not a state actor because it is a private "voluntary" association applying "its own law," i.e., its own "private" rules and regulations in requiring that UNLV, a State university, suspend Tarkanian, a State employee, simply cannot prevail.[35] This Court has long recognized that a private party's joint participation with the State in state action makes the private party a state actor. *Dennis v. Sparks*, *supra*; *Adickes v. S.H. Kress and Co.*, *supra*. Here, at the NCAA's insistence, the State has delegated its statutory powers and responsibilities with respect to disciplining state employees to the NCAA and installed the NCAA's standards as the State's standards on that issue. *Cf. Evans v. Newton*, *supra*; *Smith v. Allwright*, *supra*; *Nixon v. Condon*, *supra*. Furthermore, the State has then imposed the standards, procedures and determinations dictated by the NCAA under the State's statutory and common law authority over state employees, because of the State's contractual obligation to the NCAA to do so. *Cf.*, *Moose Lodge No. 107 v. Irvis*, *supra*, 407 U.S. at 177-179 (1972); *Terry v. Adams*, *supra*. This joint participation of the NCAA and the State in suspending Tarkanian makes the NCAA a state actor.

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[35] The suspension of Tarkanian clearly satisfies the first test set forth in *Lugar*, "whether the claimed deprivation has resulted from the exercise of a right or privilege having its source in state authority," 457 U.S. at 939, since the deprivation can be "ascribed to [a] governmental decision" and "the authority of state officials . . . put the weight of the State behind [the NCAA's] private decision. . . ." 457 U.S. at 940. As discussed throughout this brief, the suspension of Tarkanian also satisfies the second test in *Lugar*, "whether, under the facts of this case, . . . private parties may be appropriately characterized as 'state actors,' " 457 U.S. at 939, because this Court has "consistently held that a private party's joint participation with state officials . . . is sufficient to characterize that party as a 'state actor' for purposes of the Fourteenth Amendment." 457 U.S. at 941.

III. THE NCAA AND THE STATE WERE JOINT PARTICIPANTS IN SUSPENDING TARKANIAN BECAUSE OF THE INTERDEPENDENCE AND SYMBIOTIC RELATIONSHIP BETWEEN UNLV AND THE NCAA WITH RESPECT TO SUSPENDING TARKANIAN WITHOUT DUE PROCESS OF LAW.

In *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), a public parking garage had leased space to a private restaurant that discriminated on the basis of race. This Court concluded that this leasing "constituted a physically and financially integral and, indeed, indispensable part of the State's plan to operate its project as a self-sustaining unit." 365 U.S. at 718-719, 723-724. Conversely, the restaurant enjoyed the benefits of the garage's property tax exemption and the State's agreement to furnish utilities and make structural and exterior repairs. 365 U.S. at 719-720. The garage provided a convenient place for patrons of the restaurant to park – perhaps increasing the demand for the parking facilities – and the restaurant claimed that serving blacks would injure its business, meaning that "profits earned by discrimination not only contribute to, but also are indispensable elements in, the financial success of a governmental agency." 365 U.S. at 724.

This Court held that:

> The State has so far insinuated itself into a position of interdependence with [the private restaurant] that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment.

365 U.S. at 725. Subsequent decisions have reaffirmed this holding, characterizing the requisite interdependence as a "symbiotic relationship," but found no state action because either or both of the parties were not in fact sufficiently dependent on the other to create the requisite symbiotic relationship. *See Blum v. Yaretsky*, *supra*, 457 U.S. at 1010-1011; *Rendell-Baker v. Kohn*, *supra*, 457 U.S. at

842-843; *Jackson v. Metropolitan Edison Company*, *supra*, 419 U.S. at 357-358; *Moose Lodge No. 107 v. Irvis*, *supra*, 407 U.S. at 174-177.

In *San Francisco Arts & Athletics v. Olympic Committee*, *supra*, this Court held that the United States Olympic Committee ("USOC") was not a governmental actor so as to make its suit to restrain use of the term "Olympic," under a Federal statute giving the USOC exclusive use of that term, subject to the limitations of the Fifth Amendment. 107 S. Ct. at 2984-2987.[36] However, four Justices of this Court would have found the requisite joint participation or nexus under the principles enunciated in *Burton*. 107 S. Ct. at 2987, 2991-2993.[37]

Admittedly, as this Court's decisions reflect, it is truly a rare case that presents the requisite interdependence or symbiotic relationship, but this is such a case. UNLV is wholly dependent upon the NCAA for its ability to engage in major intercollegiate athletics, and that dependence is directly related to Tarkanian's suspension; if UNLV does not impose the sanctions required by the NCAA against Tarkanian, UNLV risks additional sanctions from the NCAA, including being barred from engaging in major intercollegiate athletics.

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[36] This Court expressly refused to consider whether the USOC's obtaining of an injunction from the District Court constituted governmental action under *Shelley v. Kraemer*, *supra*, because it was not fairly encompassed within the questions presented in the petition for certiorari. 107 S. Ct. at 2987 n.30.

[37] The NCAA relies on this Court's observation in the *Olympic Committee* case that: "Neither the conduct nor the coordination of amateur sports has been a traditional governmental function." 107 S. Ct. at 2985; P. Br. 37. However, as the NCAA recognizes, that comment properly relates to the "public function" question (P. Br. 37), and respondent is not relying on the NCAA's performance of a "public function" here. This Court has already refused to tolerate Fourteenth Amendment violations resulting from the joint action of the State and private parties granted exclusive control of municipal recreational facilities for school athletic contests. *Gilmore v. City of Montgomery*, 417 U.S. 556 (1974).

J.A. 103-104, 180-183. Conversely, the NCAA is entirely dependent upon its member institutions, including state universities like UNLV, to implement and enforce its standards and determinations with respect to intercollegiate athletics. J.A. 104-107. And, once again, this dependence is directly related to the state action in question here; the NCAA has required that UNLV suspend Tarkanian, UNLV has acquiesced, and it is UNLV's suspension of Tarkanian that has been enjoined by the courts below.

Thus, this case presents a classic example of the interdependence or symbiotic relationship found decisive in *Burton*. UNLV is dependent upon the NCAA and must impose the NCAA's directives with respect to Tarkanian or risk being unable to participate in intercollegiate athletics. The NCAA is dependent upon UNLV, and must look to UNLV to impose its directives against Tarkanian, or risk being unable to implement and enforce its standards, determinations and chosen penalties against State employees connected with intercollegiate athletics. As to the matters in question here, this interdependence is complete and an integral part of the challenged action. Consequently, this interdependence, or symbiotic relationship, makes the NCAA and UNLV joint participants in the state action suspending Tarkanian. *Burton v. Wilmington Parking Authority*, *supra*.

The NCAA relies on this Court's comments in *NCAA v. Board of Regents of University of Oklahoma*, 468 U.S. 85 (1984), noting that the NCAA "plays a critical role in the maintenance of a revered tradition of amateurism in college sports" and "needs ample latitude to play that role . . . ." 468 U.S. at 120; P. Br. 31 n.11. There, however, this Court recognized that this "ample latitude" did *not* include exclusive control over the televising of intercollegiate athletic events, because it is "well settled that good motives will not validate an otherwise anticompetitive practice." 468 U.S. at 101 n.23.

The same is true with respect to Fourteenth Amendment violations. *See, e.g., Cooper v. Aaron*, 358 U.S. 1 (1958). *No one* questions the purposes and goals of the NCAA. As amply confirmed by the evidence and judgment below, however, the NCAA's methods are quite a different matter.

The NCAA has demanded a decisive, rather than an advisory role with respect to disciplining state employees connected with intercollegiate athletics. Given that choice, fundamental fairness demands that the NCAA give state employees connected with intercollegiate athletics the same due process rights as the State must give to all other state employees. Otherwise, the State would be free to simply evade its Fourteenth Amendment obligations by transferring its responsibilities to private parties like the NCAA. The question here has been the destruction of the reputation, livelihood and 30-year professional career of a prominent state employee. The importance of that question demands that Tarkanian's due process rights as a state employee not be sacrificed to the NCAA's practical ability to usurp the State's disciplinary power over state employees connected with intercollegiate athletics, because of the NCAA's exclusive control over access to, as well as the regulation of, intercollegiate athletics.

Furthermore, recognition of Tarkanian's due process rights need not impair the NCAA's "critical role in the maintenance of a revered tradition of amateurism in college sports." The NCAA's power to set standards and compel adherence to those standards, including standards requiring the severance of private parties from university athletic programs, remains unimpaired. The only difference is that if the NCAA wishes to retain the exclusive power to decide when a state employee must be suspended from his duties, as opposed to leaving that decision-making function in the hands of the State, then the NCAA must give that state employee the same

due process rights to which he would be entitled from the State. That is hardly an unfair imposition, given the NCAA's reliance on the State's power over state employees to enforce its determinations against state employees; it is simply the same obligation imposed on the State itself by the Fourteenth Amendment.[38]

CONCLUSION

The relationship between the NCAA and state universities like UNLV presents a rare and perhaps unique relationship between private parties and the State.

First, the NCAA contractually requires that UNLV abide by NCAA disciplinary decisions concerning persons connected with intercollegiate athletics, but looks solely to UNLV to enforce its disciplinary decisions against state employees like Tarkanian. Second, UNLV not only has delegated its state power and authority to determine disciplinary conditions for state employees to the NCAA, but also has contractually agreed to impose the NCAA's disciplinary determinations against state employees connected with intercollegiate athletics, because UNLV could not do otherwise and engage in intercollegiate athletics. Third, the result of this interdependence is a classic symbiotic relationship in which each party is wholly dependent upon the other in disciplining state employees like Tarkanian.

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[38] Holding that the NCAA is a state actor will not subject to § 1983 liability other private parties – concerned citizens, media, consultants – who also seek to influence state decisions. These private parties do not seek to compel state officials to render decisions without due process and they differ from the NCAA in the degree of influence they exercise over state decisionmaking and in the degree of authority contractually delegated to them by the state.

Each of these factors, separately as well as in combination, makes the NCAA a joint participant in UNLV's suspension of Tarkanian and thus a state actor. The judgment below should be affirmed.[39]

Respectfully submitted,

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[39] The NCAA's demand in the Conclusion to its brief (P. Br. 48) that the "judgment should be reversed, and the injunctions should be dissolved" cannot be granted in any case. UNLV did not appeal the injunction entered against it to the Nevada Supreme Court and as a result, the injunction prohibiting UNLV from suspending Tarkanian is final and not subject to review here. *Heath v. State of Alabama*, 474 U.S. 82, 106 S. Ct. 433, 436-437 (1985); *Marsh v. State of Alabama*, 463 U.S. 783, 785 n.3 (1983); *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 671 n.2 (1976); *cf. Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394 (1981); *Ackermann v. United States*, 340 U.S. 193 (1950).

ADDENDUM

ADDENDUM

LIST OF EXHIBITS CITED AND VOLUME AND PAGE OF RECORD ON APPEAL ("ROA") WHERE THEY WERE OFFERED AND ADMITTED INTO EVIDENCE.

EXHIBITS	OFFERED	ADMITTED
EX. 1	VIII, 1875	VIII, 1875
EX. 2	VIII, 2146	VIII, 2147
EX. 3	IX, 2331	IX 2332
EX. 8	IX, 2378	IX, 2379
EX. 11	VIII, 1880	VIII, 1881
EX. 12	VIII 1882	VIII, 1882
EX. 14	IX, 2318	IX, 2321
EX. 16	VIII, 1896	VIII, 1897
EX. 17	VIII, 1897	VIII, 1897
EX. 19	VIII, 1898	VIII, 1899
EX. 20	VIII, 1893	VIII, 1893
EX. 22	VIII, 2074	VIII, 2075
EX. 24	VIII, 1876	VIII, 1876
EX. 26	IX, 2375	IX, 2375
EX. 27	VIII, 1901	VIII, 1902
EX. 28	VIII, 2131-32	VIII, 2132
EX. 31 (a) (b) (c)	VIII, 2095	VIII, 2099
EX. D	VIII, 1928	VIII, 1928
EX. E	X, 2666	X, 2666

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No. 87-1061

In the Supreme Court of the United States

OCTOBER TERM, 1987

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Petitioner,

vs.

JERRY TARKANIAN,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF NEVADA

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Six years ago, in *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922 (1982), this Court clarified the two elements of proof that a plaintiff must satisfy in order to sustain a claim against a private defendant under the Fourteenth Amendment or 42 U.S.C. § 1983. Those two requirements go right to the heart of the "state action" and "color of state law" questions, especially in cases such as this, where the central focus of the dispute is on enforcement of a regulation or rule.

The plaintiff must show first that the claimed deprivation has "its source in state authority" (457 U.S. at 939) and second that the defendant is "a person who may fairly be said to be a state actor." (457 U.S. at 937). The Court in *Lugar* also emphasized that, "[a]lthough related, these two principles are not the same." *Id.*

This simple, yet comprehensive two-part test is first concerned with the source of the rule being enforced, and second with the character of the actor enforcing the rule. It imparts a measure of stability, certainty and predictability that would not otherwise be available were the Court to proceed simply by case-to-case adjudication as existed to some degree prior to *Lugar*, and as respondent would have it.

The respondent has, in effect, put all of his eggs into the second prong basket. He virtually ignores the first requirement, that the substantive rule of decision be governmental rather than private. Though he says it in different ways, respondent's three arguments that the NCAA and UNLV are "joint participants" are directed only to the second of the two relevant requirements.

Although the respondent's "joint participation" arguments are not sufficient to show the kind of intertwining between state and private actors that the second prong requires, the Court need never reach that issue, because the case can be decided on a much narrower ground. The Court meant what it said in *Lugar* that the plaintiff must show *both* that the rule of decision springs from a governmental and not a private source, and also that the enforcer is a state actor.

By ignoring the first prong of *Lugar*, respondent vitiates the important rationale underlying that test for limiting the scope of the state action doctrine. The *Lugar* doctrine recognizes that important associational rights are subject to infringement if courts can too readily impose constitutional obligations upon a private group's decision-making processes. 457 U.S. at 936. The first prong of *Lugar* serves as a bulwark against such intrusions by per-

mitting private associations to operate without judicial interference so long as their decisions are based upon private norms and not state law. Because it is obvious that the NCAA's rules were adopted by the membership without governmental encouragement or coercion, and not even the respondent seriously contends that the first prong of the *Lugar* test has been satisfied, the judgment of the Nevada Supreme Court must be reversed on that ground alone.

I. TARKANIAN HAS NOT SHOWN THAT THE NCAA's ACTION IS ATTRIBUTABLE TO A STATE RULE OF DECISION.

The issue before the Court is whether the NCAA engaged in state action when it directed UNLV to show cause why it would not be an appropriate corrective action for the University to suspend temporarily Tarkanian from his intercollegiate athletic coaching duties for his involvement in UNLV's violations of NCAA rules.[1] UNLV and Tarkanian violated rules which were adopted by the members of the NCAA. It was those rules which authorized the directive to UNLV to show cause.

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1. No specific reply is needed to respondent's "Statement of the Case" for, although it seriously mischaracterizes the facts, they are, by and large, irrelevant to the sole issue accepted for certiorari, i.e., state action. We mention, however, one example of the twisting and torturing of the facts to which respondent resorts. He states at page 13, n.16 that "at least one NCAA Committee member frankly admitted he had made up his mind against UNLV before any hearings took place because of UNLV's attacks upon the NCAA staff." The citations to the record do not support this. The Committee member's testimony indicates neither that he made a decision prior to hearing, nor that UNLV's criticism of the NCAA staff was a basis of decision on the merits of the inquiry. This tactic of mischaracterizing facts also occurred before the NCAA Committee, which perhaps influenced its findings. This tactic continues today, as can be seen in respondent's rewriting of the Question Presented in his brief to this Court.

It is undisputed that the NCAA is a private association. No university or college is obliged to join, and many choose not to. A member, by becoming such, subjects itself to the power of the association to adopt and enforce association rules. As with any voluntary association, membership is a privilege which the association may accord or withhold as its members by rule dictate.

It is further undisputed that the privileges and rights of membership are extended to any four year school that agrees to the obligations and duties set forth in the NCAA Constitution and Bylaws (J.A. 82); that all members agree to administer their intercollegiate athletic programs, including basketball, in accordance with the Constitution and Bylaws (J.A. 82); and that procedures for disciplinary or corrective actions against members are provided in the NCAA Constitution (J.A. 83). Tarkanian has admitted that he knew and understood NCAA rules when he arrived at UNLV, and that he was responsible for insuring UNLV's intercollegiate basketball program was in compliance with those rules (Tr. XI 2830, VIII 1981). It is undisputed that UNLV, in part because of the actions of Tarkanian, was found by a duly appointed Committee to have violated those rules, and that the various sanctions were imposed on UNLV, a member, and not on Tarkanian. Tarkanian concedes that the NCAA did not sanction him. His brief states, "UNLV, a state actor, not the NCAA suspended him." Respondent's Brief, p. 22.

The relevant question under the first prong of the *Lugar* test, then, is whether petitioner, in imposing sanctions against UNLV, acted under authority of state law. Respondent attempts to avoid this inquiry on the ground that "there is no question there was state action - UNLV,

not the NCAA, suspended Tarkanian." Respondent's Brief, p. 31.[2] In support of this theory, respondent cites a number of cases in which, he says, the "joint participation" of the State and a private party alone established state action. *See Tulsa Professional Collection Services, Inc. v. Pope,* 108 S.Ct. 1340 (1988); *Lugar, supra; Adickes v. S. H. Kress & Co.,* 398 U.S. 144 (1970); *Shelley v. Kraemer,* 334 U.S. 1 (1948). However, every one of these cases is a paradigmatic example of private exercise of a right or privilege *created* by the State, and there-

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2. Respondent argues, as he must, that the Court explicitly limited the *Lugar* two-prong test to prejudgment attachment cases. Respondent's Brief, pp. 25-26, n.20. The language which respondent cites, however, states only that the particular "joint action" which the Court found sufficient to satisfy the "state action" prong of the *Lugar* test in the prejudgment attachment context might not serve the same purpose in other contexts. *Lugar,* 437 U.S. at 939, n.21.

Tarkanian concedes, however, that *Lugar* applies principles developed by this Court in previous cases. Respondent's Brief, p. 26. These earlier cases illustrate that the inquiry into the source of the relevant law (that is, the rule of decision) is crucial to the application of § 1983. In *Moose Lodge No. 107 v. Irvis,* 407 U.S. 163 (1972), the discriminatory guest policies involved were those of a private lodge, and this Court held that there was no state action. In *Polk County v. Dodson,* 454 U.S. 312 (1982), there was no state action by a public defender where the relevant rule of decision had its source in the canons of professional responsibility. In *Lugar,* the rule of decision was a state statute, and the Court held that there was state action.

Recent opinions of this Court continue to probe the source of authority. In *Tulsa Professional Collection Services, Inc. v. Pope,* 108 S.Ct. 1340 (1988), on which respondent relies, the source of governing law was an Oklahoma statute. Most recently, in *West v. Atkins,* 56 U.S.L.W. 4664, 4666 (U.S., June 20, 1988), the two-prong *Lugar* test was applied to find a prison physician liable under § 1983. This Court noted that the defendant must have exercised power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." The prison physician was found to be a state actor because he was a state employee acting within the scope and course of his employment. None of these cases involved prejudgment attachment, and it is readily apparent that the two-prong test of *Lugar* was not intended to be, and is not, limited to such actions.

fore the first prong of *Lugar* was easily satisfied. Under these holdings, state action does not exist solely because a private party somehow "participates" in the State's activity. Rather, the inquiry is whether the private party's own participation occurred under state authority.[3]

The determination of whether a private party acts under color of state law is particularly important in a case such as this. This entire controversy centers on the action taken by the NCAA pursuant to its avowed purpose of promoting sportsmanship, scholarship and amateurism in intercollegiate athletics. It is undisputed that neither the State of Nevada nor any other state influenced or coerced either the adoption of Association rules or the NCAA's decision that UNLV and Tarkanian violated them. That is simply not a decision for which the state is responsible, although it may have reacted to it. Whether the school affected is UNLV, or Wake Forest, or any other of the hundreds of member institutions, the standards are the same. They were adopted by vote of the members of the Association, and they are enforced by the Association. Clearly, the NCAA took no action under the authority of any state law.[4]

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3. Respondent also cites *Dennis v. Sparks*, 449 U.S. 24 (1980), in which the Court held that private parties who conspired with a judge to deprive another of his property could be sued for conspiracy to violate § 1983 even though the judge enjoyed immunity. Because the decision in *Dennis v. Sparks* focused on the conspiracy, rather than the source of law being applied, it is not surprising that the Court's opinion, authored by Justice White, was "not referenced in his opinion for the Court in *Lugar* decided less than two years later." Respondent's Brief, p. 29. *Dennis* is simply not relevant where, as here, there is no allegation of conspiracy.

4. Both the respondent and the Nevada Supreme Court attach significance to the fact that the school involved in this

(Continued on following page)

The "joint participation" issue posed by respondent was decided by this Court six years ago, in *Blum v. Yaretsky*, 457 U.S. 991 (1982). Similar to respondent's contention here, the petitioner in *Blum* argued that constitutional restraints should be imposed upon the entire decision-making process leading to an adjustment of Medicaid benefits. This Court, however, reviewed each participant's decision separately, applying traditional state action analysis to each, and concluded that, although the state responded to medical decisions of private physicians by adjusting Medicaid benefits, this did not render the state "responsible" for those medical decisions. 457 U.S. at 1005. The medical decisions about which the Medicaid patients complained were made by physicians exercising "medical judgment . . . according to professional standards that are not established by the state," *id.* at 1008, and were therefore not made "under color of state law." In *Blum*, as here, there was no suggestion that the state influenced the physicians in any way in adjusting the degree of medical care, "although it clearly responds to it." *Id.*, n.19. The physicians may have erred in their decision to lower the degree of care, but that fault was not of constitutional concern.

In sum, the law is clear, despite respondent's arguments to the contrary, that a private party's action under the

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Footnote continued—

particular case is public rather than private. This is truly a distinction without a difference. Whether the NCAA's promulgation and enforcement of its standards are to result in lawsuits under the Fourteenth Amendment or § 1983 cannot depend on the fortuity of whether those standards are enforced against public or private schools. This argument simply emphasizes the fact that this case involves nothing more than a private association setting its own standards for membership and continued participation, and then taking steps to implement those standards.

authority of state law is an essential element of a state action claim. Respondent has made no effort to show, and cannot show, that petitioner's action had its source in a state rule of decision. For this reason alone, petitioner could not have been a state actor subject to the restrictions of the Due Process Clause.

II. TARKANIAN HAS NOT SHOWN THAT THE NCAA IS A STATE ACTOR.

Even if it could somehow be shown that the NCAA acted under state law, Tarkanian's action must fail, for *Lugar* requires that he show "something more." *Lugar*, 457 U.S. at 939. This second test focuses on the nature of the relationship between the private actor and the state. Tarkanian advances three arguments in this regard. First, he contends that "the NCAA utilized state officials to enforce its determination that Tarkanian be suspended without due process of law." Respondent's Brief, p. 24. He supports this argument with confusing assertions concerning "overt official involvement." Respondent's Brief, pp. 25-28. However, as the authorities on which he relies reveal, overt official involvement is considered only when a state statute is involved. *See, e.g., Tulsa Professional Collection Services, supra; Lugar, supra; Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149 (1978). Furthermore, there can be no overt official involvement here. UNLV at most acquiesced in the NCAA's recommended corrective action. Otherwise it actively opposed the NCAA's actions. At bottom, respondent's first argument appears to depend upon the assumption that the relevant "state action" is UNLV's suspension of Tarkanian. Because the issue here is the NCAA's imposition of sanctions, not UNLV's response to those sanctions, this argument must fail.

Tarkanian's second argument is that the NCAA is exercising a power traditionally reserved to the states, the power to discipline state employees.[5] Again, the two-tiered decision-making process in this case refutes his argument. The NCAA does not discipline the employees of its members. Rather, it sets minimum standards for the conduct of intercollegiate athletic programs for members that wish to remain in good standing with the Association, and recommends to member institutions appropriate corrective action when athletic personnel fail to comply with those standards. Because the NCAA is a voluntary Association, the decision to accept or reject a recommendation rests exclusively with the member.

Here, the Association found UNLV in violation of its standards, and determined that an appropriate corrective action would include the two year suspension of Tarkanian. That decision did not suspend Tarkanian nor could it have. The NCAA did not have "the weight of the state behind [its] private decision." *Lugar*, 457 U.S. at 940. UNLV did not clothe the NCAA with the power of authority to act against its employees. Tarkanian admits the NCAA did not and could not suspend him. Respondent's Brief, p. 28. UNLV "reacted" to the Association's decision by suspending Tarkanian.

Indeed, Tarkanian concedes that UNLV had other options besides suspending him. Respondent's Brief, p. 17.

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5. The contention that disciplining state employees is a "traditionally exclusive state function" trivializes the public function doctrine, for a state always acts for itself. Under respondent's analysis, one who builds state roads, sells equipment to the state or even cuts state lawns would become a delegee of a "traditionally exclusive state function." This Court has stated its reluctance "to extend the sovereign-function doctrine outside of its present carefully confined bounds." *Flagg Brothers, Inc. v. Brooks*, 436 U.S. at 163. This case presents no occasion for deviation from that prudent rule.

As the UNLV Hearing Officer noted, the University had at least three options, only one of which involved Tarkanian's suspension. The University could (1) reject the NCAA's recommendation and risk the imposition of alternative penalties which might or might not involve Tarkanian; (2) accept the NCAA's recommended corrective action and suspend Tarkanian from NCAA-governed sports; or (3) "[p]ull out of the NCAA completely . . ." Respondent's Brief, pp. 22, 31.[6] It was the University, not the NCAA, which exercised the function of disciplining a state employee. UNLV has delegated nothing to the NCAA. Rather, it has chosen to abide by the rules it and other colleges and universities adopted in order to participate in intercollegiate athletics.[7]

This does not mean that the NCAA does not have leverage over institutions or their coaches, students or other representatives. To insure that members and their representatives abide by membership rules, the Association must have the ultimate power to revoke the privileges of membership. This is not, however, the power to discipline a state employee.

An argument virtually identical to the respondent's argument that the NCAA performs a function traditionally and exclusively reserved to the state was rejected

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6. The fact that UNLV admittedly had at least three options, only one of which involved compliance with the NCAA's decision, undermines respondent's argument that the University was contractually bound to suspend Tarkanian.

7. The fact that UNLV may be subject to further sanctions by the NCAA is of little import. In *Blum*, the states administering Medicaid rules were also subject to federal sanctions (including termination) for failure to monitor health care needs of patients, as were the private nursing homes. This Court discounted the import of those potential sanctions. 457 U.S. at 1009-10. *See also Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 358 (1974) (regulated monopolist is not for that reason alone subject to constitutional restraints on otherwise private conduct).

in *Blum*. The regulation of state and federal Medicaid programs is undoubtedly a function traditionally and exclusively the prerogative of the government. Yet the Court found that day-to-day decisions of nursing homes, which affect the patient's right to receive Medicaid benefits, are not the kinds of decisions traditionally and exclusively made by government. 457 U.S. at 1012. That the government responds to those decisions by adjusting the patient's benefits "does not render it responsible for those actions." *Id.* at 1005.

Here the NCAA's function is the governance of intercollegiate athletics for member institutions, which is not a function traditionally and exclusively reserved to the government. *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 107 S.Ct. 2971, 2985 (1987). As in *Blum*, the fact that the State may respond to the NCAA's action by disciplining an employee does not mean that the NCAA itself exercises the state's function.[8]

The respondent assures us that "holding that the NCAA is a state actor will not subject to § 1983 liability other private persons—concerned citizens, media, consultants—who also seek to influence state decisions." Respondent's Brief, p. 46, n.38. How can he make that assurance? His only standard appears to be "joint participation." The contexts within which joint participa-

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8. Respondent's reliance upon the White Primary Cases is wholly misplaced. Respondent's Brief, pp. 35-37. There simply is no comparison between a State's attempt to exclude minorities from a meaningful right to vote by allowing a "voluntary" association to serve as an obstacle to access to the electoral process and a college's decision to abide by a private association's rules as a condition of playing men's basketball with other members of that association. Clearly, there is a large difference between deciding who is going to vote and who is going to coach basketball.

tion between state and private parties may be found is virtually limitless. Obvious examples are private agencies which set accrediting standards for schools, hospitals and other public institutions, such as the American Bar Association, the American Medical Association and organizations that administer entrance exams, such as the Law School Aptitude Test. Are they to be deemed state actors as well? In the narrow context of athletics, are booster groups, alumni groups and paid consultants, which often provide input that results in the hiring and firing of coaches, "joint participants" with states within the context of state action? Is Stanford University a state actor because it chooses not to add UNLV to its basketball schedule while Tarkanian continues to coach there? The respondent's call for an *ad hoc* determination leaves little insight into the predictability of such an outcome.

For these reasons, we submit that the respondent's characterization of this case as involving a state's delegation of personnel decisions to a private entity is neither factually nor legally correct. He cites no document, statute or rule illustrating any delegation by UNLV to the NCAA. He points only to UNLV's reaction in suspending him. He admits that only UNLV could sanction him, and acknowledges that it had other alternatives. He does not dispute that member schools, through the NCAA, establish rules under which they will continue to compete with UNLV. In short, his quarrel lies with his employer, UNLV, not the NCAA.

Respondent's third argument, that under *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) there is a "symbiotic relationship"[9] between the Association

9. This theory was not argued or briefed by Tarkanian in the court below, and was not addressed by that court.

and the University is also misplaced. First, as noted in petitioner's opening brief, the relationship here was not symbiotic but rather antagonistic.[10] Second, the respondent concedes that this doctrine has been rarely invoked. Respondent's Brief, p. 43. As this Court's decision in *Blum*, 457 U.S. at 1010-11, and *Rendell-Baker v. Kohn*, 457 U.S. 830, 842-43 (1982) indicate, the doctrine has no application where one entity sets and enforces standards which are followed by another.

Tarkanian concludes that the injunction against UNLV is final and cannot be dissolved by this Court because the University did not appeal to the Nevada Supreme Court. Respondent's Brief, p. 47, n.39.[11] However, it is established that in equity cases this Court has power to fashion complete relief. *Albermarle Paper Company v. Moody*, 422 U.S. 405, 418-19 (1975); *Porter v. Warner Holding Company*, 328 U.S. 395, 398 (1946); *Bell v. Hood*, 327 U.S. 678, 684 (1946). *See also* 28 U.S.C. § 1651. Specifically, this Court's power to dissolve an injunction against a party who has not appealed is illustrated by *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 180 (1972), where an injunction against the Pennsylvania Liquor Authority and the Moose Lodge was dissolved, although only the Moose Lodge had appealed. Complete relief in this Court requires that the injunction against UNLV, as well as the NCAA, be lifted.

10. This is illustrated by UNLV's granting tenure to Tarkanian on July 1, 1977, after the NCAA Committee on Infractions had made its determination implicating Tarkanian in violations of its rules. Respondent's Brief, p. 1. The adversarial relationship is further demonstrated by the fact that UNLV did not appeal the injunction against it prohibiting Tarkanian's suspension.

11. Respondent cites several cases which hold that this Court will not consider issues not advanced or considered in the court below. That situation does not exist here. The NCAA challenged the entire injunction in its appeal to the court below, and that court responded by modifying the entire injunction. Tarkanian did not argue against the modification below, and did not seek review of that modification here.

CONCLUSION

For these reasons, as well as those set out in petitioner's opening brief, the judgment of the Nevada Supreme Court should be reversed, and the injunctions dissolved.

Respectfully submitted,

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